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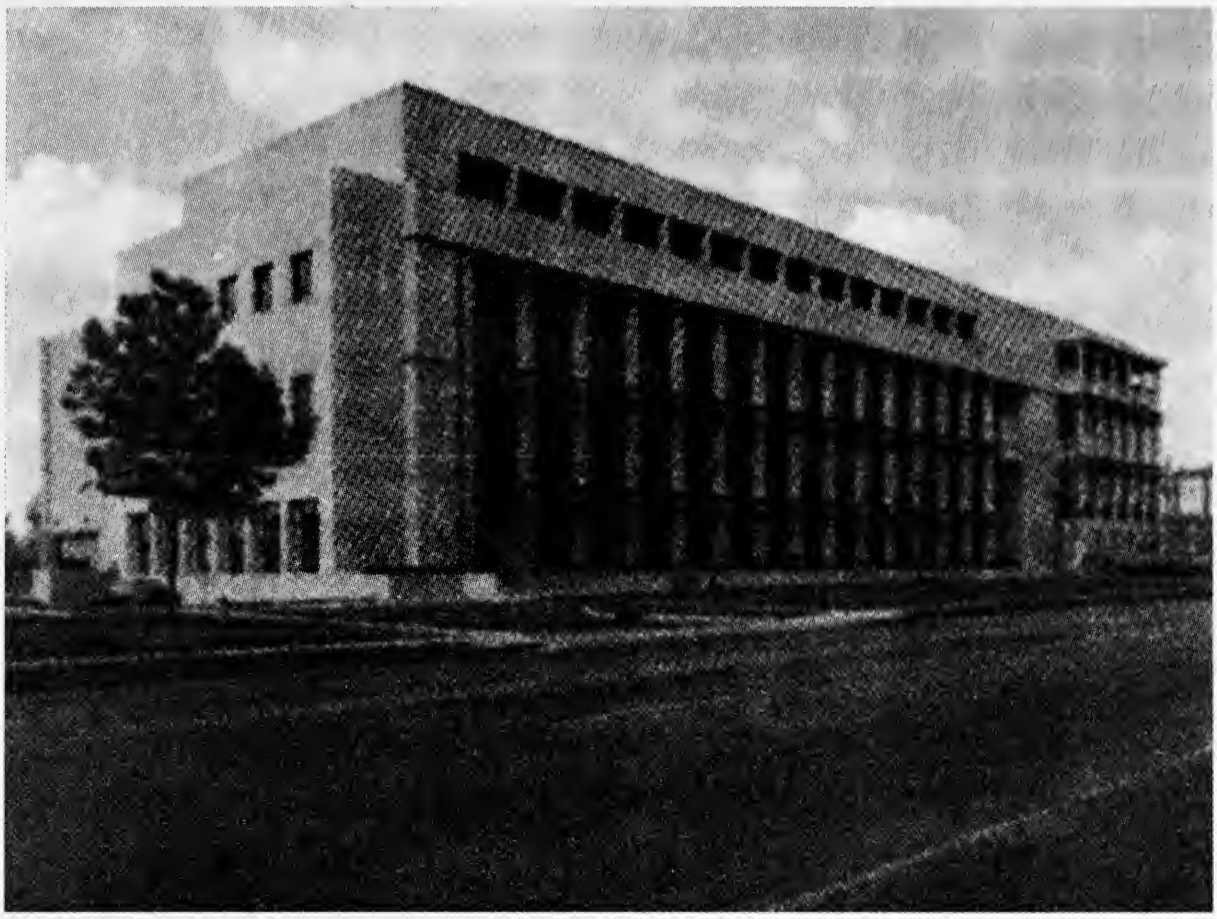

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ARTICLES

WHERE ETHICS MERGE WITH SUBSTANTIVE LAW—AN ANALYSIS OF TAX MOTIVATED TRANSACTIONS

JAMES M. DELANEY*

INTRODUCTION

During the last decade and more acutely during the last several years, there appears to be an extraordinary increase in the number of instances in which the courts, Congress, and the media have questioned the legality and ethics associated with the financial activities of wealthy individuals and businesses.[1] Among the more common are those instances in which corporate and high wealth individual taxpayers have engaged in transactions structured to minimize or avoid imposition of federal income taxes. These transactions generally are referred to as "tax shelters" or "sham transactions" and as the Internal Revenue Code (the "Code") becomes more complex, the transactions themselves have become extraordinarily complex and hard to identify.[2]

This Article focuses on the recent wave of public accounting, insurance, investment banking, and other consulting firms entering into the business of providing advice in relation to federal tax law. In a number of instances, lawyer and nonlawyer consultants have designed, marketed, and facilitated the execution of tax shelters to taxpayers with the objective of receiving a portion of the reduction in the taxpayers' federal income tax liability as fees. While the transactions in question are generally designed to meet the specific requirements

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1. *See, e.g.*, Dep't of the Treasury, *Listed Abusive Tax Shelters and Transactions*, *at* http://www.irs.gov/businesses/corporations/article/0,,id=120633,00.html (last visited Feb. 16, 2005) (containing a growing list of over thirty transactions identified by the Internal Revenue Service as abusive tax shelters most of which have been identified as such in the last five years); Joseph A. Bankman, *The New Market in Corporate Tax Shelters*, 83 TAX NOTES 1775, 1776 (1999) ("It is virtually certain though, that annual investments in corporate tax shelters aggregate to tens of billions of dollars, and that the tax shelter market is growing at a breakneck speed.").

2. *See, e.g.*, Bankman, *supra* note 1, at 1776. ("The new corporate tax shelter is much more sophisticated and complex than its 1980s predecessor. It may involve tangible assets, such as equipment subject to long-term lease, but is more likely to involve financial instruments. It is also much more aggressive in its interpretation of the tax law.").

of the letter of the law, many such transactions have been determined by the Internal Revenue Service (the "IRS") and the courts to be in violation of the spirit of the law. The proliferation of these transactions is detrimental to the U.S. system of taxation and is in conflict with the policy reasons underlying the creation of the progressive tax system in the United States.[3]

There have been a number of attempts to address the problem which have focused on enacting statutes that require disclosure, additional information reporting, or impose penalties upon those who design and market or "promote" such transactions. Most recently, the American Jobs Creation Act of 2004[4] (the "Jobs Act") contained a number of provisions designed to curtail tax shelter activity. The IRS has also proposed new rules to regulate professionals who practice in front of the IRS. While impact of the Jobs Act is yet to be seen, the rules imposed thus far have fallen short of meaningfully dissuading the aggressive behavior of the taxpayers and professionals involved. Although there are arguably a number of ways to attack the problem, at base the problem arises in part from a failure to impose appropriate penalties and ethical restraints on the providers of advice.

This Article sets out to identify those responsible for the recent increase in tax shelter activity and analyzes the effectiveness of the current judicial, statutory and regulatory regimes in reducing such activities. The Article focuses on the relationship between taxpayers and their professional advisors and questions whether the new provisions targeting tax shelter activity under the Jobs Act will have a measurable impact on those who would promote or engage in tax motivated transactions. The Article argues that the penalty provisions under the new act are insufficient to deter aggressive taxpayers and promoters.

The Article concludes that the judicially developed doctrine aimed at identifying sham transactions is inherently flawed when applied to tax shelter transactions that are developed and marketed by professional firms. Specifically, the low threshold of evidence required to satisfy the economic substance prong of the sham transaction doctrine allows taxpayers, through tax opinions issued by their tax advisors, to avoid imposition of accuracy-related penalties imposed under the Code. Additionally, because the accuracy-related penalties are so

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3. *See* Prepared Testimony of Mark W. Everson, Commissioner, Internal Revnue [sic], Progress Report on the IRS Restructuring and Reform Act of 1998 (May 20, 2003), *available at* http://www.irs.gov/pub/irs-utl/rra98_joint_review_final_written.pdf (The testimony indicated that the IRS is now working to identify and refocus its resources on the biggest areas of risk to the tax system. Toward the end of FY 2002, the IRS began realigning its resources to concentrate on key areas of non-compliance with the tax law, primarily among higher-income taxpayers and businesses. These include, among other things: the promotion of abusive tax schemes, the misuse of devices such as offshore accounts to hide or improperly reduce income, the use of abusive tax avoidance transactions, the underreporting of income by higher-income individuals.).

4. American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418. The President signed the Jobs Act on October 22, 2004. White House Press Secretary, Statement on H.R. 4520 (Oct. 22, 2004), the American Jobs Creation Act of 2004, *available at* http://www.whitehouse.gov/news/releases/2004/ 10/20041022-2.html.

interrelated with the ethical rules that govern tax advisors who practice in front of the IRS, professional advisors and taxpayers who engage in promoting tax shelters should be jointly and severally liable for penalties or ethical sanctions in instances where the transactions are determined to be shams which lack economic substance or a valid business purpose.

I. THE JUDICIAL, CONGRESSIONAL & AGENCY EFFORTS TO ATTACK MARKETED SHAM TRANSACTIONS

A. Judicial Efforts

Since the inception of the Code, taxpayers have been motivated by a desire to engage in transactions which result in reducing their overall tax liability. Substantial analysis has been done on the evolution of current doctrines developed by the courts in response to the dilemma of how to distinguish between transactions engaged in for legitimate nontax business and economic reasons versus transactions engaged in solely for the purpose of avoidance of tax, the latter being targeted as improper and not respected for federal income tax purposes. The following discussion highlights the history of the sham transaction doctrine in the Supreme Court and the courts of appeal. The goal of this section is to identify the elements of the test for identifying a sham transaction and to identify certain characteristics that are common to many sham transactions.

1. The Supreme Court on "Sham Transactions."—In the area of tax motivated transactions, an historical analysis must begin with the case of *Gregory v. Helvering*.[5] In *Gregory*, the taxpayer owned 100% of United Mortgage Corporation ("UMC") which held highly appreciated stock in an unrelated corporation.[6] Under the law at that time, if taxpayer had caused her wholly-owned corporation to distribute the appreciated stock, the distribution would have been treated first as a taxable sale by the corporation followed by a taxable dividend to the taxpayer.[7] Instead of executing a distribution, taxpayer incorporated a Delaware company, Averill Corporation ("Averill"). Taxpayer then caused the UMC to transfer all of the highly appreciated shares to Averill in return for issuance of all Averill shares to herself. Immediately thereafter, taxpayer caused Averill to distribute the highly appreciated shares to herself in

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5. Gregory v. Helvering, 293 U.S. 465 (1935); *see, e.g.*, United States v. Wexler, 31 F.3d 117,122 (3d Cir. 1994); Kirchman v. Comm'r, 862 F.2d 1486, 1490 (11th Cir. 1989); Yosha v. Comm'r, 861 F.2d 494, 497 (7th Cir. 1988); *see also* Marvin A. Chirelstein, *Learned Hand's Contribution to the Law of Tax Avoidance*, 77 YALE L.J. 440, 441 (1967) ("Hand's decisions on the subject of tax avoidance were more often criticized than praised by the tax bar; yet it was apparent at an early date that those decisions were likely to prove highly influential in the development of the law. His opinion in *Helvering v. Gregory*, which established his preeminence as a tax judge, was a major event in the history of tax administration in this country and is still among the most significant and best remembered judicial statements on the subject.").

6. Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934), *aff'd*, 293 U.S. 465 (1935).

7. *Id.*

liquidation of Averill.[8] It then became possible to sell the distributed shares at a reduced tax liability.

Taxpayer conceded that all of the steps were executed with sole purpose of reducing taxes but argued that avoidance or evasion of taxes is appropriate if it falls within an exception of tax law.[9] On appeal to the Second Circuit, Judge Learned Hand held the transaction was a "sham" not to be respected for federal tax purposes.[10] Judge Hand ruled that while a taxpayer may arrange his affairs to reduce his taxes to as low an amount as possible, the transaction must be within the intent of the statute in order to avoid taxation.[11] Applying the rule, Judge Hand found that by immediately liquidating Averill and selling the appreciated shares, the taxpayer had ignored the intent of the reorganization sections of the Code.[12]

On appeal to the Supreme Court, the issue was framed as whether a reorganization structured to qualify as "tax free" under the Code was supported by the underlying purpose of the reorganization statutes.[13] The Court "denied reorganization treatment with respect to a stock distribution even though the taxpayer had followed each step required by the Code for reorganization."[14] The Court held "the structure of the transaction was a 'mere device' for the 'consummation of a preconceived plan' and not a reorganization" within the meaning of the Code as it then existed.[15] The Court found that the transaction was simply an operation having no business purpose and that the reorganization was a "disguise for concealing its real character," the sole object of which was a preconceived plan, not to reorganize a business, but to transfer corporate shares to the taxpayer in an effort to reduce taxes upon an immediate sale thereafter.[16] The Court reasoned that while a new and valid corporation was created; such corporation was not brought into existence for any valid business purpose.

The Court focused heavily on the taxpayer's motive behind the transaction.[17] The Court determined that the taxpayer's motive in forming Averill was an "elaborate and devious form of conveyance masquerading as a corporate reorganization, and nothing else."[18] By including a subjective analysis of the taxpayer's motive in determining that the transaction was taxable, the Court respected the substance of the transaction over its form. That is, notwithstanding that the form of the transaction met the strict requirements of the statute granting

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8. *Id.*
9. *Id.*
10. *Id.* at 811.
11. *Id.*
12. *Id.*
13. Gregory v. Helvering, 293 U.S. 465, 469 (1935); *see, e.g.*, Winn-Dixie Stores, Inc. v. Comm'r, 113 T.C. 254, 278 (1999).
14. *Winn-Dixie*, 113 T.C. at 278.
15. *Id.*
16. *Gregory*, 293 U.S. at 469.
17. *Id.*
18. *Id.* at 470.

tax free status to the transaction, the substance of the transaction—the taxpayer's desire to avoid tax—was the Court's focus.

The economic substance of the transaction was simple. The taxpayer was first presented with the problem of an increased tax liability associated with the holding of appreciated stock. In order to reduce the overall tax liability, the taxpayer sought to use the reorganization and liquidation sections of the Code to prevent one level of taxation. There was concededly no nontax business profit associated with either form of the transaction. She followed the steps required to execute a proper reorganization and liquidation but, notwithstanding that these steps were properly executed, the Court recharacterized the transaction into a taxable sale followed by a distribution.

The Supreme Court again addressed a tax motivated or "sham" transaction in *Knetsch v. United States*.[19] In *Knetsch*, the taxpayers, husband and wife, and an insurance company engaged in a financial shell game. Their intent was to provide the taxpayers with interest deductions that could be used to offset the taxpayers' income each year the game continued.[20] Like most tax motivated transaction fact patterns of the recent past, the facts of *Knetsch* contain involved mathematical computations. While the computations first appear rather complex, when the math is simplified, the substance of the transaction becomes unmistakably tax motivated.

In *Knetsch*, the taxpayers purchased "deferred annuity savings bonds" with a face amount of $400,000 bearing 2.5% interest from an insurance company ("Company").[21] In order to pay the purchase price of $4,004,000, taxpayers paid the Company $4000 and signed a note for $4,000,000 to the insurance Company which note bore interest at 3.5%.[22] The note required interest to be paid in advance, therefore, on the same day, taxpayers paid $140,000 of interest to the Company.[23] In theory, the taxpayers were paying for a guaranteed stream of annuity payments in the future. On the first day of the purchase, the stream of future annuity payments was presumably worth approximately $4,004,000. The closer the bonds came to maturing, the more valuable they would be due to the impending annuity payoff.

It is important to understand the economics of the deal between the taxpayers and the Company. Who would pay $4,004,000 for bonds at 2.5% interest and then turn around and borrow substantially all of the purchase funds from the same company at 3.5% interest? In short, the taxpayers were thrilled with the transaction because the interest payments at 3.5% were deductible (at very high marginal rates) for tax purposes. The reader should also note that the 1% spread is the crème for the Company in the transaction.

After two years, taxpayers had paid the Company $294,570 and received $203,000 back in the form of purported "loans." Taxpayers' out-of-pocket total

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19. Knetsch v. United States, 364 U.S. 361 (1960).
20. *Id.* at 361.
21. *Id.* at 362. Note that 2.5% compounded annually on $400,000 face value is $10,000.
22. *Id.* at 362-63.
23. Note that $140,000 is 3.5% of $4,000,000 compounded annually.

payment of $91,570[24] was purportedly for the nontax purpose of obtaining either annuity or death benefits, or both. However, the purported objective to obtain annuity or death benefits becomes less believable when one compares the tax benefits to the anticipated death or annuity benefits. Taxpayers' interest deductions in 1953 and 1954 totaled $290,570. In 1953 and 1954 the top U.S. marginal income tax rate for married couples filing jointly was 92% and 91% prospectively.[25] Assuming that the taxpayers had income sufficient to place them in the highest tax rate, they would have avoided paying $265,853 of income taxes.[26] Thus, for a payment out-of-pocket of $91,570 to the insurance company, the taxpayers received a net benefit of $174,283.[27]

In concluding the transaction that the taxpayer engaged in was a fiction or "sham," the Court acknowledged the rule espoused in *Gregory v. Helvering* that a taxpayer may decrease or avoid taxes by means which the law permits but also required that the taxpayer have a motive apart from avoidance of taxes.[28] Based upon an economic analysis, the Court found that the transaction engaged in by the taxpayer in *Knetsch* did not "appreciably affect [their] beneficial interest except to reduce [their] taxes."[29] The Court reasoned that there was "nothing of substance to be realized by Knetsch from this transaction beyond a tax deduction."[30] Similar to the Court's decision in *Gregory*, the *Knetsch* Court appears to focus on the "substance" of the transaction. However, instead of focusing on the subjective intent or nontax business purpose of the taxpayer, the *Knetsch* Court objectively analyzed what economic substance or profit was financially in the transaction for the taxpayers apart from tax savings.

The *Knetsch* Court exposed the fiction behind the transaction by pointing out the $91,570 that the taxpayers were out-of-pocket was ostensibly paid to the Company in return for an annuity contract with a so-called guaranteed cash value at maturity of $8,388,000.[31] This contract purportedly would produce monthly

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24. This is the difference between the $294,570 and the $203,000 taxpayer received back in the form of "loans."

25. *See* ROBERT A. WILSON, IRS, DATA RELEASE: PERSONAL EXEMPTIONS AND INDIVIDUAL INCOME TAX RATES, 1913-2002, at 217 (2002) (containing a historical list of individual tax rates from 1913 through 2002), *available at* http://www.irs.gov/pub/irs-soi/02inpetr.pdf. Note that the calculations presented here are for illustration purposes only and do not take into account all of the rules in effect during 1953 and 1954. For instance, for 1953, the highest tax rate was subject to a maximum effective rate limitation equal to 88% of statutory "net income." *Id.* at 223 n.18. Further, for 1954, the highest tax rate was subject to a maximum effective rate limitation equal to 87% of statutory "net income." *Id.* at 223 n.19.

26. This amount represents the total of the 1953 tax benefit of $131,988 (92% of $143,465) plus the 1954 tax benefit of $133,866 (91% of $147,105).

27. This amount represents the excess of the tax benefit of $265,853 over the out-of-pocket expenses of $91,570.

28. Knetsch v. United States, 364 U.S. 361, 365 (1960).

29. *Id.* at 366 (quoting Gilbert v. Comm'r, 248 F.2d 399, 411 (2d Cir. 1957)).

30. *Id.*

31. *Id.* at 365.

annuity payments or substantial life insurance proceeds.[32] However, the existence of any available benefits was a "fiction" because each year taxpayers' borrowings kept the net cash value at "the relative pittance of $1,000."[33] The $91,570 difference was retained by the Company as its fee for providing the "façade of 'loans'" whereby the taxpayers sought to reduce their taxes via related interest payments.[34] The Court noted that "there may well be single premium annuity arrangements with nontax substance which create an indebtedness"[35] for the purposes of the tax code but the Court labeled this transaction as a "sham."[36]

Unlike the analysis in *Gregory*, the Court relied primarily on a mathematical analysis of the transaction to show there was effectively no internal build-up in value of the policies due to the fact that the taxpayer consistently borrowed virtually all of the internal build-up each year. From a financial and economic perspective, the transaction can be looked at as a sharing or splitting of the tax savings between the taxpayers and the Company. The taxpayers realized a tax benefit of $174,283, approximately 2/3 of the total tax savings after payment of the Company's fees, and the Company received the remaining 1/3, or $91,507, in the form of fees.[37] By looking objectively at the economic facts, the Court was able to determine that the taxpayers' sole intention was to avoid paying taxes. As such, the economic-sham analysis focuses on the economic substance to be realized by the taxpayer from a transaction.[38]

2. *The Evolution of Economic Substance in the Courts of Appeal.*—As previously indicated, there appears to be an increasing number of transactions that have been designed to avoid taxes and a corresponding increase in the level of scrutiny by the IRS in detecting and exposing such transactions. This trend has led, among other things, to a number of recent cases that have been adjudicated by the Tax Court and reviewed by the circuit courts of appeal.

Since the early decisions of the Supreme Court, the test for determining whether a transaction has "economic substance" has generally evolved in the circuit courts of appeal. The discussion below seeks to illustrate a general trend in relation to the sequence of activities engaged in by taxpayers and their professional advisors in tax shelter cases. This trend appears to indicate the primary motives of the taxpayer to either avoid taxes or, in the event the transaction is challenged, avoid the payment of any penalties associated with the nonpayment of such taxes. It is that same sequence of engaging in the transaction that reveals the deficiency or defect of the economic substance analysis that ultimately frees taxpayers and their tax advisors to engage in such activities.

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32. *Id.*

33. *Id.*

34. *Id.* at 366.

35. *Id.*

36. *Id.*

37. Is it merely a coincidence that the Company appears to have obtained approximately one-third of the tax savings and the taxpayers took two-thirds?

38. *Knetsch*, 364 U.S. at 366; *see also* Am. Elec. Power Co. v. United States, 326 F.3d 737, 743 (6th Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004).

a. Fourth Circuit—Rice's Toyota World, Inc. v. Commissioner.—In *Rice's Toyota World, Inc. v. Commissioner*,[39] the taxpayer was primarily engaged in the sale of new and used automobiles.[40] Mr. Rice, taxpayer's founder and president, "learned about computer purchase and leaseback transactions through a friend who had entered into similar transactions with Finalco," a computer leasing corporation.[41]

In February 1976, taxpayer entered into an agreement with Finalco to purchase a used computer from Finalco for $1,455,227 payable over eight years. Finalco then leased the computer back from taxpayer paying rent to taxpayer over the same eight year period.[42] Payments made by Finalco to taxpayer annually exceeded the payments made by taxpayer to Finalco by $10,000. Contemporaneous with the sale and leaseback, Finalco subleased the computer to a third party.[43]

In May or early June 1976, after entering into the above agreement, taxpayer received projections from Finalco indicating that under the agreement taxpayer was expected to realize total projected losses from accelerated depreciation of $782,063 during the first five years. Based upon projections and other discussions, Finalco prepared a leasing memorandum which stated that the transaction was "suitable only for persons anticipating substantial taxable income from other sources."[44] Thus, the leasing memorandum focused on the tax benefits related to the depreciation deductions and qualified that these deductions would benefit only individuals that had income substantial enough to be able to take advantage of the depreciation deductions.

The Commissioner disallowed taxpayer's interest and depreciation deductions in relation to a sale and leaseback transaction asserting that the transaction was a tax avoidance scheme which should be disregarded for federal income tax purposes. The Tax Court applied a two-pronged inquiry to determine whether the transaction was, for tax purposes, a sham.[45] The court of appeals agreed with the Tax Court's analysis that to treat a transaction as a sham, the court must find (1) "that the taxpayer was motivated by no business purposes other than obtaining tax benefits in entering the transaction," *and* (2) "that the transaction has no economic substance because no reasonable possibility of a [pre-tax] profit exists."[46] Thus, in order to avoid sham treatment, the test requires that a taxpayer meet a minimum threshold of either a business purpose or economic substance.[47]

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39. Rice's Toyota World, Inc. v. Comm'r, 752 F.2d 89 (4th Cir. 1985).
40. *Id.* at 91.
41. *Id.*
42. *Id.*
43. *Id.*
44. Rice's Toyota World, Inc v. Comm'r, 81 T.C. 184, 188-89 (1983).
45. *Rice's Toyota World, Inc.*, 752 F.2d at 91.
46. *Id.*
47. *Id.*

In analyzing the second prong of the sham inquiry, the court in *Rice's Toyota World, Inc.* stated that the economic substance prong requires "an objective determination of whether a reasonable possibility of profit from the transaction exists apart from tax benefits."[48] The court found that the transaction carried no hope of earning a profit for the taxpayer unless the computer had residual value sufficient to recoup the $200,000 in net principal and interest that Rice paid Finalco.[49] Accepting the valuation testimony of IRS valuation experts, the court agreed with the Tax Court's finding that the residual value of the computer was not enough to earn taxpayer a profit.[50] Notwithstanding the court's holding that the transaction had no hope of earning nontax profits, no penalties were imposed upon the taxpayer for engaging in the transaction.

Like the taxpayer in *Knetsch*, the taxpayer in *Rice's Toyota World* heard about the tax benefits associated with a particular transaction. Taxpayer's accountant contacted Finalco, a corporation engaged in leasing equipment, which resulted in Finalco providing information focusing on the transaction's ability to generate large tax losses in early years. Finalco promoted the transaction and assisted the taxpayer in executing the transaction with the sole goal of avoiding taxes. As a computer sale and leaseback, the transaction had no relationship to the taxpayer's business activity of selling new or used automobiles. The taxpayer had no meaningful motivation for entering into the transaction other than to economically reduce its federal tax liability.

With respect to the first prong of the analysis, stating that the business purpose inquiry concerns the subjective motive of the taxpayer in entering the transaction, the court of appeals found that the taxpayer's sole motivation for purchasing and leasing back the computer was to achieve the large tax deductions that the transaction provided in the early years of the lease.[51] The court supported its conclusion by finding, among other things, that the taxpayer paid an inflated purchase price for the computer and did not seriously evaluate whether the computer would have sufficient residual value at the end of the lease.[52]

As applied by the court in *Rice's Toyota World*, the business purpose prong of the sham inquiry does not appear to make a distinction with respect to *when* the taxpayer develops its business purpose. Rather, it appears the taxpayer initially may have only a tax motivated desire to engage in the transaction so long as a meaningful business purpose is developed at some point during the execution of the transaction. The taxpayer in *Rice's Toyota World* did not appear to have a nontax business purpose when Finalco was originally consulted and was later unable to adduce a legitimate nontax business purpose as required by the first prong of the test.

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48. *Id.* at 94.

49. *Id.* Note that the amount of principal and interest actually paid by Rice is reduced by $80,000 paid in $10,000 annual increments paid by Finalco to taxpayer.

50. *Id.*

51. *Id.* at 92.

52. *Id.*

b. Eleventh Circuit.—In 1989, the Eleventh Circuit addressed the sham transaction doctrine in *Kirchman v. Commissioner*[53] indicating that the sham transaction doctrine emerged from the Supreme Court's decision in *Gregory* and had gained wide acceptance.[54] The Eleventh Circuit accepted the general notion that the substance of the transaction governs the tax consequences as opposed to the form.[55] The *Kirchman* court held that while a taxpayer may structure a transaction to minimize tax liability, the transaction must nevertheless have economic substance.[56] Citing *Rice's Toyota World*, the *Kirchman* court stated that the determination of whether the taxpayer had a legitimate "business purpose" in entering into the transaction also involves a subjective analysis of the taxpayer's intent.[57] The inquiry into whether the transaction has "economic substance" beyond the creation of tax benefits is an objective rather than a subjective inquiry.[58]

However, the court found it unnecessary to determine whether the taxpayer subjectively had a business purpose and held that the transaction was a sham based upon an objective analysis indicating that the transaction lacked a profit motive and therefore lacked economic substance.[59] In relation to the taxpayer's profit motive, the court agreed with the Tax Court's conclusion that the taxpayer engaged in a prearranged transaction in order to achieve tax avoidance rather than nontax profit objectives. The Tax Court held that where the only substance of a transaction is the creation of income tax benefits for a fee, that transaction is a sham for income tax purposes.[60] Once again, notwithstanding the court's determination that the transaction was a sham lacking in economic substance, no penalties were imposed upon the taxpayer under the Code.

In *Kirchman*, the court focused only on the economic substance prong of the sham inquiry. The Eleventh Circuit appears to first apply the objective second prong and if the court determines on an objective basis that the transaction had economic substance, it will go on to the subjective prong to determine if the subjective intent of the taxpayer is appropriate.[61] However, if the court determines the transaction lacked economic substance, the analysis is complete and the transaction is deemed to be a sham not respected for tax purposes.[62]

In *Winn-Dixie Stores, Inc. v. Commissioner*,[63] the Eleventh Circuit again addressed the sham transaction doctrine. In *Winn-Dixie*, the taxpayer, a food retailer, was approached by Weidman & Johnson and The Coventry Group

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53. Kirchman v. Comm'r, 862 F.2d 1486 (11th Cir. 1989).
54. *Id.* at 1490-91.
55. *Id.* at 1491.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 1493.
60. *Id.*
61. *Id.*
62. *Id.*
63. 254 F.3d 1313 (11th Cir. 2001), *cert. denied*, 535 U.S. 986 (2002).

(together hereinafter "WJ/Coventry") with a proposal for Winn-Dixie to purchase "individual excess interest life insurance policies on the lives of Winn-Dixie's employees."[64] Information provided to Winn-Dixie by WJ/Coventry indicated that the policies would consist of "a group of corporate-owned life insurance (COLI) policies covering a wide cross-section of [Winn-Dixie's] employees."[65] In short, Winn-Dixie purchased whole life insurance policies on almost all of its full time employees, numbering about 38,000.[66] Winn-Dixie was the sole beneficiary of the policies.

WJ/Coventry, as promoters of the transaction, provided Winn-Dixie with a proposal for the purchase of the policies.[67] The chairman and chief executive officers of WJ/Coventry provided a memorandum to Winn-Dixie describing the benefits and drawbacks of the proposed plan.[68] The memorandum summarized the tax aspects of the COLI program and provided numerous detailed projections of the costs and benefits associated with the COLI plan.[69] In summarizing the tax aspects of the COLI program, the memorandum opined on the tax issues raised by the proposed COLI program, the legislative status from a tax perspective of future COLI programs and exit strategies available to Winn-Dixie in the event that the tax law in effect changed.[70]

The projections contained in the memorandum indicated that during each year that the policies remained in effect, the plan would generate pre-tax losses.[71] However, on an after tax basis the projections indicated that the plan would generate profits.[72] That is, the deductions associated with the plan would sufficiently reduce taxes otherwise payable by Winn-Dixie such that the tax benefits would exceed any actual economic loss experience by Winn-Dixie. In essence, like the situation in *Knetsch*, the high interest rate charged by the insurance company plus administrative fees to execute the transaction exceeded the net cash surrender value and benefits of the policies, with the result that in pre-tax terms, Winn-Dixie lost money on the program. However, the deductions for interest and fees by Winn-Dixie on the policy loans yielded an estimated tax benefit that was projected to reach billions of dollars in excess of any projected pre-tax losses.[73]

On appeal to the Eleventh Circuit Court of Appeals, citing *Kirchman*, the court again first addressed the economic substance of the transaction in question

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64. Winn-Dixie Stores, Inc. v. Comm'r, 113 T.C. 254, 256 (1999), *aff'd*, 254 F.3d 1313 (11th Cir. 2001).

65. *Id.*

66. *Id.* at 257.

67. *Id.* at 256.

68. *Id.*

69. *Id.* at 256-61.

70. *Id.* at 259.

71. *Id.* at 260-63.

72. *Id.*

73. *Id.* at 263.

and found that the transaction could never generate a pre-tax profit.[74] However, aside from the manner in which the economic substance test was applied, the actual sequence of the transaction is again of interest. Winn-Dixie, as the taxpayer, was initially approached by WJ/Coventry, a group of insurance professionals.[75] These professionals provided specific and complex advice in relation to tax issues raised by the proposed COLI plan. Like the taxpayers in *Rice's Toyota World*, the advice included an extraordinary number of projections that focused primarily on the pre-tax and post-tax consequences of the transaction.[76] Prior to WJ/Coventry approaching Winn-Dixie, Winn-Dixie itself had no knowledge of COLI plans and no apparent business purpose for engaging in the COLI transaction. Representatives of WJ/Coventry solicited Winn-Dixie to engage in a highly complex transaction, advised Winn-Dixie of the tax consequences of the transaction, opined as to the validity of the transaction under existing tax law and assisted Winn-Dixie in executing the steps necessary to engage in the transaction.[77] From start to finish, WJ/Coventry was instrumental in Winn-Dixie's decision to engage in a transaction that was later determined to be a "sham" transaction for federal income tax purposes. Once again, regardless of the fact that the transaction was designed to be a sham with the sole objective of reducing tax liabilities, there were no penalties imposed on the taxpayer under the penalty provisions of the Code.

Under the circumstances in which the transaction was marketed, it seems unlikely that Winn-Dixie, or any taxpayer presented with the COLI transaction, could have had a valid nontax business purpose in relation to the transaction. Where a taxpayer is approached with a proposal that is represented to be profitable on an after-tax basis, it seems illogical that a nontax business purpose later contrived for purposes of satisfying the business purpose prong of the sham transaction inquiry should be respected. Where taxpayers and their advisors contrive a nontax business purpose after deciding to engage in the transaction, it would seem that the taxpayer's subjective intent remains focused on obtaining the tax benefits.

c. Other circuits.—The sequence of events that led up to the transaction described in *Knetsch*, *Rice's Toyota World*, and *Winn-Dixie* appears to be a common thread in many transactions that have been determined to be shams for federal income tax purposes. In *ACM Partnership v. Commissioner*,[78] *ASA Investerings Partnership v. Commissioner*,[79] *SABA Partnership v. Commissioner*,[80] and *Boca Investerings Partnership v. United States*,[81] Merrill

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74. Winn-Dixie Stores, Inc. v. Comm'r, 254 F.3d 1313, 1316 (11th Cir. 2001).

75. *See Winn-Dixie Stores, Inc.*, 113 T.C. at 254.

76. *See id.* at 254, app. A.

77. *Id.* at 280-82.

78. 73 T.C.M. (CCH) 2189 (1997), *aff'd in part and rev'd in part*, 157 F.3d 231 (3d Cir. 1998), *cert. denied*, 526 U.S. 1017 (1999).

79. 76 T.C.M. (CCH) 325 (1998), *aff'd*, 201 F.3d 505 (D.C. Cir.), *cert. denied*, 531 U.S. 871 (2000).

80. 78 T.C.M. (CCH) 684 (1999), *vacated*, 273 F.3d 1135 (D.C. Cir. 2001), *remanded to* 85

Lynch (Merrill) promoted an investment plan to large U.S. corporations. The principal purpose of the investment plan was to generate substantial amounts of capital losses which were projected to be used to offset huge capital gains.[82]

In *ACM*, Colgate-Palmolive Co. (Colgate), was approached by representatives of Merrill.[83] Representatives of Merrill were aware that Colgate had reported a sizeable capital gain (approximately $105 million) for its 1988 taxable year in relation to its sale of a corporation, and that Colgate might be receptive to the proposed transaction.[84] Through an introduction facilitated by representatives of Merrill, a meeting was held on May 15, 1989, at which the transaction was described to Colgate's assistant treasurer.[85] "Merrill's representatives stated that, apart from the few elements that were essential to secure the desired tax consequences, the partnership structure could be adapted to suit a variety of investment objectives."[86]

"Colgate's initial reaction to the proposal was skeptical" and its assistant treasurer "was not persuaded that the partnership would serve a business purpose of Colgate."[87] Colgate's vice president of taxation agreed that "but for the tax benefits, the transaction did not accomplish anything useful for the company."[88] He also "was concerned that the transaction did not have sufficient economic substance to withstand scrutiny. Absent a connection to Colgate's business, [he] believed, the necessary support would not be forthcoming."[89]

However, after a substantial amount of analysis on the part of the representatives of Merrill, Colgate's vice president of taxation became convinced

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T.C.M. (CCH) 817 (2003).

81. 314 F.3d 625 (D.C. Cir.), *cert. denied*, 540 U.S. 826 (2003).

82. *See, e.g.*, *SABA P'ship*, 78 T.C.M. (CCH) 684. Generally, the investment plan proposed was for the U.S. corporations and a foreign (non-U.S.) entity to jointly form a foreign (non-U.S.) entity not subject to U.S. income taxation. The partners would contribute substantial capital to the foreign joint venture with the foreign venturer retaining a substantial majority ownership interest in the foreign joint venture. The various partnerships would invest in short term private placement notes. Thereafter, the partnerships would sell the notes for a large initial cash payment with the balance of the consideration paid in notes. One-sixth of the basis of the notes would be applied to the down payment with the rest allocated to the notes under the installment sale provisions of the Code. Gain under the partnership agreement would largely be allocated to the foreign partner who owned most of the equity units of the partnership. At the end of the partnership tax year, the U.S. partner would acquire a majority interest in the foreign partnership. Thereafter, the partnerships would distribute the cash to the foreign partner and the notes to the U.S. partner in redemption of the U.S. partner's interest. The U.S. partner would then sell the notes to a third party and realize losses against which it could offset capital gains in the same tax year.

83. *ACM P'ship*, 73 T.C.M. (CCH) 2189, at *5-*9.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

that the proposed partnership would serve the purpose of debt risk management for Colgate and that this risk management would serve as a business purpose. Thereafter, Merrill provided projections that indicated substantial tax benefits; Colgate's chief financial officer and the president of the company approved the transaction.[90]

The Commissioner argued that the transaction was merely a prearranged set of steps in a contrived, tax motivated transaction and that the risk management aspect of the transaction was spurious.[91] The Tax Court found that Colgate attempted to artificially create losses through manipulation and abuse of the Code.[92] It held that the transactions lacked economic substance.[93] The Tax Court was convinced that tax avoidance was the reason for the partnership's purchase and sale of the notes and accorded little importance to the risk management aspect of the case. The Tax Court indicated that the key to determining whether a transaction has economic substance is that the transaction must be rationally related to a useful nontax business purpose that is plausible in light of the taxpayer's conduct and useful in light of the taxpayer's economic situation and intentions.[94] The court indicated that a rational relationship ordinarily will not be found unless there is a reasonable expectation that the nontax benefits would be at least commensurate with the transaction costs.[95]

The Tax Court reasoned that each of the steps in the investment strategy was planned and arranged to commence considerably in advance of execution of the transaction.[96] "Before the negotiations to form ACM, Merrill had already begun negotiations to purchase" the notes used in the transaction.[97] Before the notes were purchased, Merrill was already negotiating disposition of the notes. No supervening market forces disrupted the execution of the steps. Finally, the Court reasoned that but for the tax losses generated for Colgate, the investment strategy would not have been economically rational from a nontax perspective.[98] On appeal, the Third Circuit Court of Appeals agreed with the Tax Court's analysis. The Third Circuit agreed that the record did not support ACM's assertions that the transactions were designed either to serve nontax objectives or to generate a pre-tax profit.[99] Again, no penalties were imposed upon ACM for engaging in the tax motivated transactions.

Like the transactions in *Knetsch*, *Rice's Toyota World*, and *Winn-Dixie*,

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90. *Id.*

91. *Id.* at *80-*91.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* (citing Yosha v. Comm'r, 861 F.2d 494, 499 (7th Cir. 1988), *aff'g* Glass v. Comm'r, 87 T.C. 1087 (1986)).

96. *Id.* at *127.

97. *Id.*

98. *Id.*

99. ACM P'ship v. Comm'r, 157 F.3d 231, 254 (3d Cir. 1998), *cert. denied*, 526 U.S. 1017 (1999).

Colgate was approached by professional advisors. Prior to meeting with the representatives of Merrill, representatives of Colgate had no knowledge of the existence such a transaction. The transaction and its expected tax benefits were contrived by Merrill and the transaction was originally marketed to Colgate based solely upon the tax benefits. It was acknowledged that success of the proposal was dependent upon developing a business purpose. Upon initially hearing the proposal, Colgate's vice president of taxes believed that aside from the tax benefits, the transaction would not benefit Colgate.

Nevertheless, Merrill, in league with Colgate's vice president of taxation, was able to manufacture a purported business purpose that Colgate officers accepted. The transaction was highly structured to allegedly provide, among other things, debt risk management as a business purpose in addition to economic tax benefits. Neither the Tax Court nor the Court of Appeals for the Third Circuit accepted the various nontax business purposes forwarded by Colgate.[100] While ACM purported to engage in the transaction with a nontax debt acquisition objective, ACM's pursuit of the two separate objectives within the same partnership did not breathe a business purpose into the tax motivated aspect of the transaction.[101]

B. Congressional & Agency Efforts

1. Taxpayer Related Provisions.—

a. Economic substance doctrine.—Recently, Congress has debated several proposals to codify the "economic substance" doctrine and declined to do so.[102] Congress again declined to clarify or codify the doctrine in the Jobs Act.[103] The House version of the Jobs Act contained no proposal to codify the economic substance doctrine. However, the Senate version of the Act did incorporate a proposal to codify the economic substance doctrine, but, at the last moment, it was dropped.[104] Prior to removing the provision, the Senate version of the Jobs Act contained proposed section 401 entitled "Clarification of Economic Substance Doctrine."[105] In relevant part, proposed section 401 generally provided that if a court determines that the economic substance doctrine is relevant to a transaction, the transaction will have economic substance only if

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100. *Id.* at 256, 263; *see also ACM P'ship*, 73 T.C.M. (CCH) 2189, at *171.

101. *ACM P'Ship*, 157 F.3d at 256 n.48; *see Joint Committee on Taxation, Background and Present Law Relating to Tax Shelters, (JCX-19-02): Hearing Before the Senate Comm. on Fin.*, 108th Cong. 16 (Mar. 19, 2002) [hereinafter *Law Relating to Shelters*].

102. *See, e.g.*, CARE Act of 2003, S. 476, 108th Cong. § 701; Jobs and Growth Tax Relief Reconciliation Act of 2003, S. 1054, 108th Cong. § 301; Abusive Tax Shelter Shutdown and Taxpayer Accountability Act, H.R. 1555, 108th Cong. § 101 (2003).

103. *See* American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418.

104. *Id.*

105. *See* Jumpstart Our Business Strength Act, S. 1637, 108th Cong. § 401(a).; *see also* S. REP. NO. 108-192, § 401(a) (2003).

two requirements are met.[106] First, the transaction must meaningfully change the taxpayer's economic position apart from federal tax effects.[107] Second, the taxpayer must have a substantial nontax purpose for entering into such transaction and the transaction must be a reasonable means for accomplishing such purpose.[108] Without more, this general rule would not provide much additional guidance to taxpayers or courts on characterizing a transaction.

However, among other things, proposed section 401 also contained a special rule where a taxpayer relies on profit potential in order to satisfy the requirement of a meaningful change in economic position.[109] This special rule generally provided that a transaction shall not have economic substance unless two requirements were met. First, the present value of the expected pre-tax profit from the transaction must be substantial in relation to the present value of the expected net tax benefits. Second, the reasonably expected pre-tax profit must exceed the risk free rate of return.[110]

By requiring that the present value of the expected pre-tax profit be substantial in relation to the pre-tax benefits, the proposed provision clearly would have required taxpayers to substantiate a true economic impact and motive for engaging in the transaction. Without the proposed provision, taxpayers are left to base decisions on varying judicial interpretations of the economic substance prong of the sham transaction doctrine.

b. Accuracy-related penalties.—

i. Section 6662.—Section 6662 generally provides for "accuracy-related" penalties to be imposed on taxpayers who under certain circumstances fail to accurately report and pay sufficient taxes.[111] Section 6662 and its related regulations address the circumstances under which taxpayers will be subject to certain penalties for, among other things, an understatement of tax. Prior to new § 6662A,[112] § 6662 was the primary penalty statute specifically targeting tax shelter transactions. However, historically, while § 6662 specifically targeted tax motivated shelter transactions, rarely has it been imposed on taxpayers who have engaged in such transactions.[113] Lack of clarity in the economic substance and business purpose doctrines has, at times, caused courts to refuse to impose penalties.[114]

The § 6662 accuracy-related penalty applies to, among other things, the

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106. S. 1637 § 401.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. I.R.C. § 6662 (West, WESTLAW through P.L. 109-2, Feb. 18, 2005).

112. *See id.* § 6662A.

113. *Law Relating to Shelters, supra* note 101, at 35 n.141. *See, e.g.*, Compaq Computer Corp. v. Comm'r, 113 T.C. 214 (1999), *rev'd*, 277 F.3d 778 (5th Cir. 2001); Sheldon v. Comm'r, 94 T.C. 738, 769-70 (1990).

114. *Law Relating to Shelters, supra* note 101, at 35 n.141. *See, e.g.*, Peerless Indus. v. United States, 94-1 U.S.T.C. (CCH) para. 50,043 (E.D. Pa. 1994).

portion of any underpayment that is attributable to (1) negligence or (2) any substantial understatement of income tax.[115] The penalty is equal to twenty percent of the portion of the underpayment of tax.[116] If any portion of an underpayment[117] of tax imposed is attributable to negligence or disregard of the Code or Regulations, a penalty equal to twenty percent of the underpayment is added to the tax due.[118] With respect to substantial understatements of tax prior to the Jobs Act, if the correct income tax liability for a taxable year exceeds the amount reported by the taxpayer by the greater of ten percent of the correct tax or $5000 ($10,000 in the case of most corporations), then a substantial understatement exists and a penalty may be imposed equal to twenty percent of the underpayment of tax attributable to the understatement. Under the Jobs Act provisions, new rules apply to certain types of reportable transactions as discussed below.[119]

With respect to tax shelters, penalties related to understatements were avoided in the past under § 6662 by noncorporate taxpayers if the taxpayer established that, in addition to having substantial authority for the position, the taxpayer reasonably believed that the treatment claimed was more likely than not the proper treatment of the item.[120] A tax shelter is defined under § 6662 as (1) a partnership or other entity, (2) any investment plan or arrangement, or (3) any other plan or arrangement, if a significant purpose of such partnership, entity, plan or arrangement is the avoidance or evasion of federal income tax.[121]

Historically, under § 6662, the understatement penalty was abated in all cases in which the taxpayer could demonstrate that there was "reasonable cause" for the underpayment and that the taxpayer acted in good faith.[122] The regulations provide that reasonable cause exists where the taxpayer

> reasonably relies in good faith on the opinion of a professional tax adviser, if the opinion is based on the tax advisor's analysis of the pertinent facts and authorities [that] . . . unambiguously states that there is a greater than 50-percent likelihood that the tax treatment of the item

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115. I.R.C. § 6662(b).

116. *Id.* §6662(a).

117. Underpayment is defined in I.R.C. § 6664(a). *See also* Treas. Reg. § 1.6664-2 (as amended in 1992). Generally, the underpayment is equal to the amount of tax imposed less the amount of income tax shown on the taxpayer's return. Additional rules apply where the taxpayer either paid amounts in addition to those shown on his or her return and where any rebates were received by the taxpayer.

118. Treas. Reg. § 1.6662-3(a) (as amended in 2003).

119. *See* discussion *infra* Part I.B.1.b.ii.

120. I.R.C. § 6662(d)(2)(B); *see also Law Relating to Shelters*, *supra* note 101, at 34. However, pursuant to newly amended Code § 6662(d)(2)(C), subparagraph (B) of § 6662(d)(2) shall not apply to any item attributable to a tax shelter. I.R.C. § 6662(d)(2)(C).

121. I.R.C. § 6662(d)(2)(C)(iii).

122. *Id.* § 6664(c); *see also Law Relating to Shelters*, *supra* note 101, at 34.

will be upheld if challenged by the Internal Revenue Service.[123]

The "reasonable cause" exception has been critical to promoters' success in marketing of tax shelter opinions. In the event a taxpayer implemented a tax shelter transaction, which was challenged by the IRS, the taxpayer generally avoided penalties if the taxpayer obtained and relied upon an opinion from a tax advisor who opined that the taxpayer would "more probably than not" (a greater than fifty percent likelihood) prevail in the controversy. Where a taxpayer relied upon an opinion from his or her tax advisor but unsuccessfully defended a challenge by the IRS in relation to the transaction, courts often have not imposed a penalty.[124] Aside from the fees and expenses charged by the shelter promoters, a taxpayer was generally economically indifferent to engaging in the transaction under prior law. To the extent that a taxpayer retained the amounts that represented the tax savings from engaging in the transaction and reasonably invested the assets, the taxpayer could satisfy any later assessment of taxes and interest with the retained earnings and any investment income earned while waiting to see if the IRS successfully challenges the transaction.

ii. New I.R.C. § 6662A.—Section 812 of the Jobs Act created new § 6662A, imposing additional accuracy-related penalties on understatements with respect to "reportable transactions."[125] New § 6662A(a) imposes a penalty on understatements attributable to a "listed"[126] or reportable transaction if a significant purpose of the transaction is the avoidance or evasion of federal income tax.[127] The penalty is imposed where a taxpayer has a "reportable transaction understatement." The "understatement" referred to in relation to a reportable transaction is the increase in taxable income resulting from the

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123. Treas. Reg. § 1.6662-4(g)(4)(i)(B) (as amended in 2003); Treas. Reg. §1.6664-4(c) (as amended in 2003); *see also Law Relating to Shelters*, *supra* note 101, at 34-35.

124. *See, e.g.*, Kirchman v. Comm'r, 862 F.2d 1486 (11th Cir. 1989); Rice's Toyota World, Inc. v. Comm'r, 752 F.2d 89 (4th Cir. 1985); Winn Dixie Stores, Inc. v. Comm'r, 113 T.C. 254 (1999), *aff'd*, 254 F.3d 1313 (11th Cir. 2001).

125. A "reportable transaction" is defined under new I.R.C. § 6707A(c)(1) as any transaction with respect to which information is required to be included with a return or statement because such transaction is of a type which is determined by the Secretary of the Treasury to have a potential for tax avoidance or tax evasion. *See* American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 811(a), 118 Stat. 1418, 1575-76. On November 16, 2004, the IRS issued Notice 2004-80 providing interim guidance in relation to the Jobs Act indicating that for purposes of I.R.C. § 6111(a), a "reportable transaction" is defined under Treas. Reg. § 1.6011-4(b) (as amended in 2004). Generally, Treas. Reg. § 1.6011-4(b) provides there are six categories of reportable transactions: listed transactions, confidential transactions, transactions with contractual protection, loss transactions, transactions with a significant book-tax difference, and transactions involving a brief asset holding period.

126. New I.R.C. § 6707A(c)(2) provides that a "listed transaction" means a "reportable transaction which is the same as, or substantially similar to, a transaction specifically identified by the Secretary as a tax avoidance transaction."

127. *See id.* § 6662A.

difference between the proper tax treatment of an item and the taxpayer's improper treatment of the same item.[128] This understatement amount generally is multiplied by the highest rate of tax imposed under either I.R.C. § 1 for an individual or I.R.C. § 11 for a corporation to arrive at the "reportable transaction understatement."[129]

It is important to note that, under the new rule, a penalty will be imposed notwithstanding that the taxpayer has no actual tax liability in the current year. Consistent with this principal, the understatement of tax is based upon the highest tax rates. Thus, in practice, the same penalty amount should apply to any understatement amount result regardless of the marginal tax rate that applies to a taxpayer or whether any tax is actually owed in the year in which the transaction was executed.

The penalty rate under § 6662A varies depending on whether the transaction is adequately disclosed.[130] If the transaction is adequately disclosed, the penalty rate is twenty percent.[131] However, where the transaction is not adequately disclosed, the penalty rate increases to thirty percent.[132] Unlike the rules that historically applied under § 6662, the new rules link the penalty rate to the disclosure requirement. In general, failure to disclose increases the penalty rate to 30%.

The addition to tax imposed under § 6662 continues to apply but it is calculated in coordination with the new § 6662A amounts. Reportable transaction understatements under the new rule are aggregated with the amount of any understatements that exist under § 6662 in order to determine whether a "substantial understatement" exists under current § 6662.[133] The § 6662 addition to tax only applies to the extent that the addition to tax under § 6662(a) exceeds the aggregate amount of reportable transaction understatements under 6662A(b).[134]

Reliance on the reasonable cause exception to an understatement penalty also varies under § 6662A depending on whether the transaction is adequately

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128. *See id.* §6662A(b)(1)(A).

129. *Id.* In cases where there is also a decrease in the aggregate amount of credits which resulted from the taxpayer's improper treatment of an item, the decrease is added to reportable transaction understatement. *See id.* § 6662A(b)(1)(B).

130. *See* STAFF OF THE JOINT COMM. ON TAXATION, 108TH CONG., COMPARISON OF CERTAIN PROVISIONS OF H.R. 4520 AS PASSED BY THE HOUSE OF REPRESENTATIVES AND AS RECOMMENDED BY THE SENATE: REVENUE PROVISIONS 11 (Comm. Print 2004) [hereinafter COMPARISON BY STAFF OF THE JOINT COMMITTEE].

131. *See* I.R.C. § 6662A(a).

132. *See id.* § 6662A(c).

133. Under §6662(d), a substantial understatement generally exists if the amount of tax required to be shown on the return exceeded the amount of tax actually shown on the return by ten percent of the tax required to be shown on the return or $5000 (whichever is greater). *Id.* § 6662(d)(1)-(2).

134. *See id.* § 6662A(e)(1).

disclosed.[135] Importantly, like the rules that have historically applied under § 6662, no penalty is imposed under new § 6662A with respect to any portion of a reportable transaction understatement if it is shown that there was a reasonable cause and that the taxpayer acted in good faith.[136] However, the reasonable cause and good faith exception only applies where the taxpayer adequately discloses the relevant facts affecting the tax treatment of an item, there was substantial authority for such treatment, and the taxpayer "reasonably believed" that such treatment was more likely than not proper.[137]

New § 6664(d) was added under the Jobs Act and provides rules relating to when a taxpayer is treated as having a reasonable belief.[138] In general, a taxpayer is treated as having a reasonable belief if such belief is based upon the facts and law that exist at the time the relevant return was filed.[139] The taxpayer's belief must be based solely on the taxpayer's chances of success on the merits without consideration of the possibility that the return will be audited or settled by the IRS. Further, in establishing a reasonable belief, a taxpayer may not rely upon an opinion of a tax advisor under two circumstances. First, an opinion may not be relied upon if the tax advisor is a "material advisor."[140] Second, an opinion may not be relied upon if it is a "disqualified opinion."[141]

In general, a material advisor is a "disqualified tax advisor" if the advisor participates in the organization, management, promotion, or sale of the transaction or is improperly compensated in relation to the arrangement.[142] This

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135. COMPARISON BY STAFF OF THE JOINT COMMITTEE, *supra* note 130, at 11.

136. *See* American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 812(c), 118 Stat. 1418, 1575-76 (amending § 6664 by adding subsection (d) providing for the reasonable cause exception).

137. Adequate disclosure is defined to be disclosure in accordance with regulations prescribed by the Secretary under § 6011. I.R.C. § 6662A(c). However, a taxpayer failing to adequately disclose in accordance with the rules is treated as having met the disclosure requirements if the penalty is rescinded under new § 6707A(d) (granting the Commissioner of the I.R.S. the power to rescind penalties if rescinding the penalty would promote compliance with the Internal Revenue Code and effective tax administration). *Id.* § 6707A(d).

138. *See* American Jobs Creation Act of 2004, § 812(c) (amending § 6664 by adding subsection (d)).

139. I.R.C. § 6664(d).

140. *Id.* § 6664(d)(3).

141. *Id.* § 6664(d)(3)(B)(iii).

142. *See id.* 6664(d)(3)(B)(ii) providing:

> (ii) Disqualified Tax Advisors.—A tax advisor is described in this clause if the tax advisor—
>
> (I) is a material advisor (within the meaning of section 6111(b)(1)) and participates in the organization, management, promotion, or sale of the transaction or is related (within the meaning of section 267(b) or 707(b)(1)) to any person who so participates,
>
> (II) is compensated directly or indirectly by a material advisor with respect to the transaction,
>
> (III) has a fee arrangement with respect to the transaction which is contingent on all or part of the intended tax benefits from the transaction being sustained, or

definition appears to broadly encompass many advisors who would seek to market tax shelter opinions.[143] The ability of a taxpayer to rely upon an opinion of a tax advisor that engages in marketing tax "opinions" to avoid penalties would appear to be severely undermined under the new rule.

Further, even if the tax advisor is not disqualified under the above rules, the opinion itself may be disqualified if it is not supported by accurate and complete facts. In general, an opinion is disqualified if it is based upon unreasonable factual assumptions, unreasonable taxpayer representations or fails to identify and consider all relevant facts.[144]

c. Disclosure of reportable transactions.—Prior to the Jobs Act and over the last several years, the Treasury Department and the IRS increased efforts in an attempt to thwart abusive tax avoidance activities. The Treasury Department finalized regulations under § 6011 requiring disclosure by taxpayers of certain abusive transactions called "reportable transactions."[145] Six categories of reportable transactions exist under the regulations each having independent characteristics.[146] At least one commentator has pointed out that the creation of the six largely unrelated attributes suggests that the IRS lacks a well defined principle for distinguishing between legitimate and illegitimate transactions.[147] Under these recent regulations, while disclosure of reportable transactions was mandatory, there was no specific penalty imposed on a taxpayer who fails to

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(IV) as determined under regulations prescribed by the Secretary, has a disqualifying financial interest with respect to the transaction.

Interim guidance has been issued under IRS Notice 2004-80 providing that a "material advisor" is defined in Treas. Reg. § 301.6112-1(c)(2), (c)(3) and (d) (2003). IRS Notice 2004-80, 2004-50 I.R.B. 963 (Dec. 13, 2004). In short, a material advisor is defined as a person who provides aid, assistance, or advice in organizing, promoting, carrying out, insuring, or selling a reportable transaction and who derives gross income in excess of $250,000. *See* Treas. Reg. § 301.6112-1(c)(3) (as amended in 2003). The gross income amount is reduced to $50,000 for a transaction if any person to whom or for whose benefit a potential material advisor makes or provides a tax statement with respect to the transaction is a partnership or trust. *Id.*

143. I.R.C. § 6664(d)(3)(B)(ii).

144. *See id.* § 6664(d)(3)(B)(iii) providing:

(iii) Disqualified Opinions.—For purposes of clause (i), an opinion is disqualified if the opinion—

(I) is based on unreasonable factual or legal assumptions (including assumptions as to future events),

(II) unreasonably relies on representations, statements, findings, or agreements of the taxpayer or any other person,

(III) does not identify and consider all relevant facts, or

(IV) fails to meet any other requirement as the Secretary may prescribe.

145. *See* I.R.C. § 6011 (2000); *see also* Treas. Reg. § 1.6011-4 (2003).

146. Treas. Reg. § 1.6011-4(b).

147. *Developments in the Law—Corporation and Society: Governmental Attempts to Stem the Rising Tide of Corporate Tax Shelters*, 117 HARV. L. REV. 2249, 2254-55 (2004) [hereinafter *Governmental Attempts to Stem the Rising Tide*].

disclose.[148]

The Jobs Act, however, does impose penalties on taxpayers for failing to disclose a reportable transaction. Generally, a penalty is imposed on any person who fails to include any information with respect to a reportable transaction.[149] The amount of the penalty varies depending upon the type of taxpayer and whether the transaction is a listed transaction. In the case of a natural person, the penalty is $10,000 and in all other cases the penalty is $50,000. If the transaction is a listed transaction, the penalty is increased from $10,000 to $100,000 in the case of a natural person and from $50,000 to $200,000 in any other case.[150] Failure to make required disclosures results in imposition of the above penalties regardless of other circumstances.

2. *Promoters.*—

a. Registration and list maintenance.—The Jobs Act modifies the old rules in relation to tax shelter registration. Under the new rules, each material advisor must file an information return for each reportable transaction.[151] The old penalty for failure to register tax shelters is repealed and a new penalty of $50,000 is imposed on a material advisor for either failing to file a return or filing a false or incomplete return with respect to a reportable transaction.[152] If the failure to report is in relation to a listed transaction, the $50,000 penalty is increased to the greater of $200,000 or fifty percent of the gross income of the person who provides aid, assistance or advice in regard to the listed transaction.[153]

Material advisors are also required to maintain a list of investors.[154] In general, the new rule modifies the penalty for failing to maintain the required list

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148. While there was no penalty for failure to disclose, a taxpayer may not have been able to rely on the reasonable cause defense. *See* I.R.C. § 6664(c)(1) (West, WESTLAW through P.L. 109-2, Feb. 18, 2005) (providing: "No penalty shall be imposed under Section 6662 or 6663 with respect to any portion of an underpayment if it is shown that there was a reasonable cause for such portion and that the taxpayer acted in good faith with respect to such portion.").

149. *See id.* § 6707A(a).

150. *See id.* § 6707A(b). Where a public corporation fails to disclose a listed transaction and a penalty is imposed under § 6662A, § 6707A(e) requires the company to disclose the penalty in reports filed with the Securities Exchange Commission.

151. *See id.* § 6111(a). For this purpose, "material advisor" means any person:

> (i) who provides aid, assistance, or advice with respect to organizing, managing, promoting, selling, implementing, insuring, or carrying out any reportable transaction, and
>
> (ii) who directly or indirectly derives gross income in excess of the threshold amount (or such other amount as may be prescribed by the Secretary) for such advice or assistance.

Id. § 6111(b)(1)(A). The threshold amount is $50,000 in the case of a reportable transaction in relation to a natural person and $250,000 in any other case. *Id.* § 6111(b)(1)(B).

152. *See id.* § 6707(a) & (b).

153. *Id.*

154. *See id.* § 6112(a).

by imposing a time limitation and a corresponding penalty. Now, a material advisor who is required to maintain an investor list and who fails to make a list available upon request will be subject to a $10,000 per day penalty.[155]

b. Section 6700: Promoting abusive tax shelters.—Section 6700 provides for imposition of a penalty on any person who, among other things, organizes, assists, or participates in the sale of any investment plan or arrangement if in connection with such activity the person makes or furnishes a qualifying false or fraudulent statement.[156] A qualified false or fraudulent statement is any statement with respect to a taxpayer's ability to take any deduction or credit, exclude any income, or secure any other tax benefit by reason of, among other things, participating in the plan or arrangement which the person knows or has reason to know is false or fraudulent as to any material matter.[157] The Jobs Act amended § 6700(a) to provide for an increased penalty in an amount equal to fifty percent of the gross income derived by the person from such activity.[158] In comparison to the old rules which generally provided for a $1000 penalty, the fifty percent penalty represents a substantial increase in the promoter penalties.

c. Section 6701: Aiding and abetting understatement of tax liability.—Section 6701 imposes a penalty on any person who: (1) aids, assists, procures, or advises with respect to the preparation or presentation of any portion of a return, affidavit, claim, or other document; (2) knows (or has reason to believe) that the document will be used in connection with any material matter arising under the internal revenue laws; and (3) knows that the document would result in an understatement of another person's tax liability.[159] The concept of aiding or abetting requires "direct involvement" in the preparation or presentation of a tax return or other tax-related document.[160]

Several definitions and special rules apply. However, the penalty for aiding and abetting with respect to an individual's tax liability is $1000.[161] The penalty increases to $10,000 if the aiding and abetting is with respect to a corporation's tax liability.[162] A person can only be subject to this penalty once with respect to a particular taxpayer per period.[163]

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155. *See id.* § 6708(a)(1).

156. I.R.C. § 6700(a)(1); *see also Law Relating to Shelters*, *supra* note 101, at 36.

157. I.R.C. § 6700(a)(2); *see also Law Relating to Shelters*, supra note 101, at 36.

158. American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 818(a), 118 Stat. 1418, 1584.

159. I.R.C. § 6701(a).

160. *Law Relating to Shelters*, *supra* note 101, at 36-37 (citing STAFF OF THE JOINT COMMITTEE ON TAXATION, 97TH CONG., GENERAL EXPLANATION TO THE TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982, at 220 (1982)).

161. I.R.C. § 6701(b)(1).

162. *Id.* § 6701(b)(2).

163. *Id.* § 6701(b)(3); *see also Law Relating to Shelters*, *supra* note 101, at 37.

II. RECENT TAX SHELTER ACTIVITY—A CASE STUDY

In 2002, the U.S. Permanent Subcommittee on Investigations of the Committee on Governmental Affairs (the "Committee") initiated an investigation into "the development, marketing, and implementation of abusive tax shelters by professional organizations such as accounting firms, banks, investment advisors, and law firms."[164] In November 2003, the Committee issued a report (the "Report") containing its findings and recommendations in relation to its study of four transactions or "tax products" that were marketed by the public accounting firm of KPMG.[165] It is important to note that while the Committee focused its case study on products sold by KPMG, the Committee indicated that other professional firms including Ernst & Young, PriceWaterhouse Coopers, Deutsche Bank, Wachovia Bank and J.P. Morgan Chase as well as many others have also sold abusive or illegal tax products.[166]

Each of the four products that the Committee focused its study on had several features in common. The products were developed by KPMG in an internal process through which tax professionals, including certified public accountants and attorneys, employed by KPMG analyzed the technical merits of the proposed products.[167] The four products included complex and highly structured transactions requiring in-depth technical legal opinions. KPMG expended substantial amounts of time, effort, and capital to develop and market the products to potential buyers. Also included within these efforts was the creation of a market research department, a Sales Opportunity Center that worked on tax product marketing strategies, and a telemarketing center staffed with people trained to make cold calls to find buyers for the tax products developed.[168]

In marketing the tax products, the Report indicated that KPMG sold the four tax products to more than 350 individuals during the years 1997 through 2001.[169] Together the four products generated fees for KPMG in excess of $124 million.[170] As of June 2002, an IRS analysis of a portion of the returns related to three of the products sold by KPMG identified 243 individuals who had relied on the transactions to claim a total of $5.8 billion in tax losses on their individual federal income tax returns.[171] In the case of one of the products, clients were charged a single fee equal to seven percent of the "tax losses" to be generated by the proposed transaction. The client typically paid the fee to the retained

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164. MINORITY STAFF OF THE PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE COMM. ON GOV'T AFFAIRS U.S. SENATE, 108TH CONG., U.S. TAX SHELTER INDUSTRY: THE ROLE OF ACCOUNTANTS, LAWYERS, AND FINANCIAL PROFESSIONALS 1 (Comm. Print 2003) [hereinafter ROLE OF ACCOUNTANTS].

165. *Id.* at 2.

166. *Id.* at 7-8.

167. *Id.* at 7.

168. *Id.* at 8.

169. *Id.* at 3.

170. *Id.*

171. *Id.*

investment advisory firm, which then apportioned the fee among KPMG, a participating bank, law firm, and others.[172]

Once a taxpayer agreed to engage KPMG for the purpose of purchasing a tax product, KPMG would assist the client in executing the transaction. Execution of the transactions required the assistance of the lawyers, bankers, investment advisors, and others to carry out the steps of each of the transactions. KPMG issued tax opinion letters advising clients of the tax consequences of the prospective transactions.[173] The Report indicates that the Committee investigation found that KPMG drafted its own prototype tax opinion letter supporting the product and used the prototype opinion letter as a template for the opinion letters actually sent to a number of clients. In addition, KPMG generally arranged for an outside law firm to provide a second favorable opinion letter.[174] The Report indicates that KPMG collaborated with a law firm, Sidley Austin Brown & Wood, prior to engaging the law firm in order to assure that the opinion would be favorable.[175] In certain instances, KPMG would exchange opinion letters with the retained law firm eventually issuing similar opinions.[176]

The prototype tax opinion letter prepared by KPMG and the retained law firm relied upon a set of factual representations made by the client. The client representations were critical to analysis and conclusions presented in KPMG's opinion letters.[177] The Report indicates that some of the key representations went to the very core requirements of the two prong sham transaction test applied by the courts. The Report indicates that the prototype opinion letter provided that the client represented to KPMG that the client had independently reviewed the economics underlying the proposed transaction and that the client believed there was a reasonable opportunity to earn a reasonable pre-tax profit from the transactions.[178]

Specifically, in relation to the economic substance doctrine, the prototype opinion letters of KPMG and the retained law firm reflected similar analysis in relation to the law. However, with respect to application of the facts to the law, neither opinion contained specific client facts. Rather, both opinion letters relied on representations made by the client who is viewed as the "investor" in the transaction and provided the following representation:

> Investor independently reviewed the economics underlying the Investment Fund before entering into the program and believed there was

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172. *Id.* at 9-10.

173. *Id.* at 11; *see also KPMG Opinion Letter on Investment Transactions Available*, 2003 TAX NOTES TODAY 238-53 [hereinafter *KPMG's Tax Opinion Letter*].

174. ROLE OF ACCOUNTANTS, *supra* note 164, at 11; *see, e.g.*, *Brown & Wood Opinion Letter on Investment Strategies Available*, 2003 TAX NOTES TODAY 238-54 [hereinafter *Sidley Austin Brown & Wood LLP's Tax Opinion Letter*].

175. ROLE OF ACCOUNTANTS, *supra* note 164, at 11.

176. *Id.* at 11-12.

177. *Id.* at 12.

178. *Id.*

a reasonable opportunity to earn a reasonable pre-tax profit from the transactions described herein (not including any tax benefits that may occur), in excess of all associated fees and costs.[179]

A. Application of the Sham Transaction Doctrine

As indicated, each of the four transactions was highly structured with the intention of, among other things, producing tax benefits for the various clients that implemented the transactions. While the four transactions differed in terms of the various Code sections used to obtain tax benefits, there were a number of characteristics that the transactions shared. Prior to being engaged by a client and prior to any marketing activities, prototype opinions were drafted that concluded that more probably than not the prospective taxpayer-clients would prevail if the proposed transactions were challenged by the IRS. The tax advisors set up a network of other professionals including lawyers, bankers and investment advisors in most instances to assist the prospective clients in implementing the product.

Application of the two pronged sham transaction analysis to the above scenario reveals the weakness of the two pronged analysis when applied to a marketed tax product. Starting with the requirement that the taxpayer must subjectively have a nontax business purpose for engaging in the transaction, it becomes obvious that no taxpayer who purchased one of the marketed tax products should be able satisfy this prong of the test. Prior to marketing the product, the promoters of the product could not have known who they would market the product to or in what business activity each prospective client would be engaged. Without identifying any particular client, it would appear to be impossible to determine what, if any, subjective intent that the prospective taxpayer might have. This necessarily leaves a promoter such as KPMG in the position of satisfying the objective economic substance prong of the sham transaction doctrine in relation to a proposed transaction. Proving that a transaction has economic substance or a pre-tax profit generally will also satisfy the subjective prong in that taxpayers generally desire (subjectively) to engage in transactions projected to have a pre-tax profit.

What level of pre-tax profit will satisfy the economic substance prong of the test? As indicated previously, Congress recently declined to clarify or codify the economic substance prong of the test.[180] The courts, however, have provided some guidance on this issue. In *ACM*, the court followed the rule that in order to have economic substance, the nontax benefits must be at least commensurate with the transaction costs.[181] In *Rice's Toyota*, the court found that the transaction carried no hope of earning a profit for taxpayer unless the computer

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179. *KPMG's Tax Opinion Letter*, *supra* note 173; *Sidley Austin Brown & Wood LLP's Tax Opinion Letter*, *supra* note 174. Both representations are verbatim.

180. *See* discussion *supra* Part I.B.1.a.

181. ACM P'ship v. Comm'r, 157 231, 249 (3d Cir. 1998) (citing Yosha v. Comm'r, 861 F.2d 494, 501 (7th Cir. 1988), *aff'g* Glass v. Comm'r, 87 T.C. 1087 (1986).

had residual value sufficient to recoup the original net principal and interest that the taxpayer paid Finalco.[182] Stated otherwise, the courts of appeal for the Third and Fourth Circuits appear to follow the rule that the projected nontax profits must exceed the transaction costs.

In relation to the economic substance requirement, there is little doubt the professional advisors involved here coordinated with a number of other professional investment advisors and banks to analyze whether there was a chance that the transaction could produce a pre-tax profit. Without analyzing the specific attributes of and facts surrounding each of the four transactions marketed by KPMG and others, one can assume that a group of very intelligent tax professionals would (and probably did) produce financial scenarios based on various possible investment parameters such as interest and market return rates. Further, one may assume that these scenarios indicated that each transaction stood some chance of producing a pre-tax profit in excess of the transaction costs.

At a baseline, the author of this Article believes that such projections are all that is needed under current law in order for tax shelter promoters and their clients to obtain comfort in the transaction from an economic substance perspective. That is, promoters of tax shelters need only seek a reasonable argument that the transaction stands a chance of producing a small economic benefit in excess of transaction costs. Once a projection is made that evidences the existence of a possible pre-tax profit, it will be left to the IRS, courts, and experts to determine whether the likelihood of the pre-tax profit satisfies the economic substance prong of the sham transaction doctrine. Herein lays the continuing defect in the economic substance test. To the extent the taxpayer can project that the transaction stands a chance of a pre-tax profit sufficient to cover the transactions costs, the taxpayer may take the position that the transaction is not a sham for tax purposes. A small chance of a sufficient pre-tax profit is highly likely to translate into a more probably than not opinion.

The proposed clarification of economic substance in the Senate version of the Jobs Act would have addressed the deficiency in the judicial doctrine.[183] The proposed clarification specifically addressed the objective economic substance prong of the sham transaction analysis. By requiring a "substantial" pre-tax profit in excess of tax benefits plus a pre-tax profit that exceeds the risk free rate of return, taxpayers and their advisors would no longer be able to conclude that transactions having a mere scintilla of profit in excess of transactions costs are sufficient to engage in a transaction under the law. In the absence of any congressional direction, taxpayers are left to rely on court opinions which differ in relation to the applicable legal standard and do not appear to provide for a test that requires a true nontax economic consequence.[184] Congressional failure to include a provision in the Jobs Act which clarifies and codifies the judicially created economic substance doctrine leaves the door open for tax shelter

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182. Rice's Toyota World, Inc. v. Comm'r, 752 F.2d 89, 94 (4th Cir. 1985).

183. *See supra* notes 105-10 and accompanying text.

184. *See* discussion *supra* Part I.B.1.a.

promoters and taxpayers to engage in tax motivated transactions.[185]

For future transactions, the existence of a thin but viable argument that a possibility of profit exits coupled with the receipt of an opinion from a qualified tax advisor will continue to support an argument that a transaction is valid even though it has little economic substance. Further, such arguments will not only target the possible success of the transaction with respect to whether it will meet the economic substance requirement, but also will continue to target avoidance of understatement penalties.

B. Application of the Code and Regulations Including the New Jobs Act Provisions

Prior to the Jobs Act, applying the relevant Code penalties to KPMG's activities resulted in very few instances where meaningful penalties applied to either taxpayers or KPMG. Where an underpayment penalty might have applied to taxpayers, the penalty was systematically avoided by obtaining an opinion from a tax advisor. Where promoter penalties applied under prior law, the penalty amounts were so minor in comparison with the fees collected by KPMG that the penalties become almost immaterial. With the advent of the Jobs Act, taxpayer reliance on undisclosed mass marketed tax motivated transactions should no longer result in avoidance of penalties. However, for a number of reasons, it is unlikely that the new penalty structure will deter all future shelter activities.

1. Analysis of Penalties Applicable to Taxpayers.—Prior to the Jobs Act, the § 6662 understatement penalty was abated in cases in which the taxpayer demonstrated that there was "reasonable cause" for the underpayment and that the taxpayer acted in good faith.[186] However, pursuant to the Jobs Act, notwithstanding that a taxpayer may show reasonable cause, a taxpayer generally may not avoid penalties if the taxpayer fails to appropriately disclose the transaction, the taxpayer relies on an opinion from a disqualified tax advisor, or if the opinion is disqualified because it is not supported by complete and accurate facts.

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185. *See* 150 CONG. REC. S11,191-203 (Oct. 11, 2004) (statement of Senator Levin, as indicated by Senator Levin in relation to failure to include the economic substance provision: "One of the most glaring of these omissions from this legislation is the provision passed by the Senate numerous times that would have required business transactions to have actual 'Economic Substance' in order to receive tax benefits. Refusing to include this anti-abuse tool means that tax dodgers will still be able to escape paying their fair share by using phony transactions that have no business purpose other than tax avoidance . . . .").

186. I.R.C. § 6664(c) (2000); *see also Law Relating to Shelters*, *supra* note 101, at 34. Again, "reasonable cause" exists where the taxpayer "reasonably relies in good faith on an opinion based on a professional tax advisor's analysis of the pertinent facts and authorities [that] . . . unambiguously concludes that there is a greater than 50-percent likelihood that the tax treatment of the item will be upheld if challenged by the Internal Revenue Service." Treas. Reg. § 1.6662-4(g)(4)(i)(B) (as amended in 2003).

a. Disclosure.—Although a taxpayer may successfully argue that reasonable cause existed based upon the economic substance of a transaction, transactions similar to those marketed and sold by KPMG may nevertheless be subject to penalties for failure to disclose. In order to assert the reasonable cause exception to the new penalty provisions, a taxpayer must adequately disclose a "reportable transaction" in accordance with the regulations.[187]

The transactions engaged in by KPMG are likely to be the type of activity which the Secretary would determine to have a potential for tax avoidance and, therefore, reportable transactions. The IRS's response to the four transactions referred to in the Report has been consistent. The IRS determined that each of the four transactions marketed by KPMG were abusive.[188] Based upon this response, a failure to report similar transactions in the future would appear, under the new rules, to preclude a taxpayer from relying upon the reasonable cause exception to the imposition of accuracy-related penalties under new § 6662A. The heightened focus on disclosure in the new rules increases the risk that a penalty will be imposed upon taxpayers who would engage in undisclosed transactions.

Without regard to ethical considerations, the beginning point for a taxpayer analyzing whether to engage in a transaction will be whether or not it is a reportable transaction. If it is determined by the taxpayer that the IRS would perceive it to be a reportable transaction, the taxpayer must then decide whether the penalties for disclosure are steep enough to induce the taxpayer to disclose. As of June 2002, an IRS analysis of a portion of the returns relating to three of the products sold by KPMG identified 243 individuals who had relied on the transactions to claim a total of $5.8 billion in tax losses on their individual federal income tax returns.[189] On average, each of the individuals involved appear to have claimed approximately $8 million in losses on their respective returns in relation to these marketed tax products.[190] Assuming that each individual is taxed at the highest marginal tax rate of thirty-five percent, each taxpayer was positioned to avoid approximately $2.8 million in taxes. Even under the new rules, it is somewhat disingenuous to think that taxpayers, such as those involved in the KPMG transactions, would be induced to disclose under the threat of a $10,000 failure to disclose penalty.

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187. *See* I.R.C. § 6664(d)(2) (West, WESTLAW through P.L. 109-2, Feb. 18, 2005).

188. IRS Notice 2000-44 (Sept. 5, 2000) (determining that BLIPs was a potentially abusive tax shelter). In August 2001, the IRS issued Notice 2001-45 (Aug. 13, 2001) (determining that both the FLIP and the OPIS transactions were potentially abusive tax shelters); IRS Notice 2004-30 (Apr. 26, 2004) (determining that the SC2 transaction and similar transactions were potentially abusive tax shelters).

189. ROLE OF ACCOUNTANTS, *supra* note 164, at 3.

190. This number was arrived at by assuming that the $5.8 billion in losses was divided equally amongst the three tax products ($5,800,000,000 divided by three products results in $1,933,333,333 of losses each). Further, it assumes that the 243 individuals equally reported losses as amongst each of the products ($1,933,333,333 divided by 243 results in $7,956,104 in losses on average per taxpayer).

Assuming a taxpayer is not dissuaded by the $10,000 penalty and chooses not to disclose, the question then becomes whether such taxpayer would be dissuaded by the possible application of the increased thirty percent accuracy-related penalty under new § 6662A(c). It is at this point that the analysis becomes unclear. First, if the taxpayer believes that the transaction is not a sham and that the transaction has economic substance or a business purpose, the taxpayer will likely move forward with the transaction. Upon a challenge by the Service, if the taxpayer prevails on the merits, there will be no tax or penalty imposed. It is here that the failure of Congress to codify the economic substance doctrine will be most acutely felt. As indicated earlier, the low threshold for economic substance within the judicially created sham transaction doctrine may result in continued taxpayer attempts to exploit the doctrine.

On the other hand, if the taxpayer loses on the merits of the transaction, the increased thirty percent penalty will likely apply due to the fact that the taxpayer did not disclose it. The fact that the taxpayer has obtained an opinion from a tax advisor should be of no assistance to the taxpayer in avoiding penalties. This signifies a meaningful change in the law where in the past taxpayers regularly chose not to disclose under the rules, but still avoided penalties by relying on an opinion to meet the reasonable cause exception.

b. Disqualified tax advisor.—Under the new rules, a taxpayer that fully discloses a reportable transaction may continue to be precluded from relying on an opinion of a tax advisor to avoid penalties.[191] A taxpayer may not rely on an opinion of a tax advisor to establish a reasonable belief if the tax advisor is a material advisor.[192] By promoting, selling, organizing, and managing the various transactions addressed in the Report, KPMG most assuredly falls within the definition of a material advisor. The new rules appear to effectively thwart the ability of taxpayers from relying on mass marketed opinions similar to those promoted by KPMG. In this respect the rules appear to be clear and are a welcome addition to deter taxpayers from relying on mass marketed opinions to avoid penalties.

In order to avoid application of the disqualified tax advisor rule, the taxpayer will be induced to obtain an opinion from separate counsel. While only time will tell, nothing in the taxpayer penalty sections appear to prevent taxpayers from implementing ideas pitched by shelter promoters if such ideas are opined upon by separate counsel who does not participate in the organization, management, promotion, or sale of the transaction. Based upon the large number of tax dollars that have been sheltered by recently promoted transactions, it is likely that taxpayers who disclose under the rules will obtain the opinion of separate counsel regarding a promoter's idea. However, one unintended effect of the new rule may occur in instances where a taxpayer chooses not to disclose. Because failure to disclose prevents a taxpayer from asserting the reasonable cause exception, taxpayers who choose not to disclose may have less of an incentive to obtain an opinion from a tax advisor.

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191. *See* I.R.C. § 6664(d)(3)(B)(ii).

192. *Id.*

c. Disqualified opinion.—Under the new rules, taxpayers who disclose an idea and retain independent qualified counsel to provide an opinion may nevertheless continue to be precluded from relying on such opinion if the opinion itself is disqualified.[193] The opinions received from KPMG and Sidley Austin Brown & Wood would likely be "disqualified opinions" due to the fact that neither opinion appeared to identify or consider all relevant facts.[194] Instead, KPMG and Sidley Austin Brown & Wood appear to have relied solely on representations made by the taxpayers or agreements with the various taxpayers.[195] However, taxpayers and advisors alike will now be induced to include analysis of relevant facts in opinions that are obtained in relation to proposed future transactions.

2. Analysis of Penalties Applicable to Tax Advisors.—

a. Registration and information reporting.—Previously, a tax shelter organizer was required to register a tax shelter with the Treasury Department. A failure to register generally resulted in a penalty imposed upon the promoter equal to one percent of the aggregate amount invested in the shelter or $500 (whichever was greater). These penalty amounts were apparently not enough to deter promoters such as KPMG from engaging in the activities described in the Report. Under the Jobs Act, material advisors are required to furnish information to the IRS in relation to any reportable transaction.[196] Again, the transactions described in the Report would all appear to be reportable transactions subject to information reporting.[197] In relation to the four tax products marketed by KPMG, a choice not to disclose the four transactions under the new rules would result in a $50,000 penalty for each undisclosed transaction. Again, applying a cost benefit analysis to the recent KPMG activities, KPMG would be subject to $200,000 of penalties for failing to disclose the four transactions.[198] An apparent substantial penalty but, again, the four products together generated fees for KPMG in excess of $124 million.[199] The penalty represents approximately 1.6% of the fees collected on the transactions. Historically, promoters as KPMG have not been dissuaded by these immaterial penalties.

It should be noted that promoters would be subject to much higher penalties where a promoter fails to furnish information in relation to a listed transaction.[200] Transactions become listed transactions only after the IRS has discovered, analyzed, and concluded that the transactions are abusive. It would seem that only the most aggressive tax shelter promoters and taxpayers would engage in an

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193. *See id.* § 6664(d)(3)(B)(iii).

194. *See KPMG's Tax Opinion Letter*, *supra* note 173; *Sidley Austin Brown & Wood LLP's Tax Opinion Letter*, *supra* note 174.

195. ROLE OF ACCOUNTANTS, *supra* note 164, at 11.

196. *See* I.R.C. § 6111(a)-(b).

197. ROLE OF ACCOUNTANTS, *supra* note 164, at 1; I.R.C. § 6707A(c); *see also* discussion *supra* Part I.B.1.b.ii.

198. The $200,000 was arrived at by multiplying the $50,000 penalty by the four transactions.

199. ROLE OF ACCOUNTANTS, *supra* note 164, at 3.

200. *See* I.R.C. § 6707(b)(2).

activity that has been listed by the IRS as an abusive transaction. It seems unlikely that a professional firm of any standing would recommend such a transaction. Nevertheless, assuming that a professional firm chooses to engage in promoting listed transactions and fails to furnish required information, the penalty is fifty percent of the gross income derived by the promoter.[201] It is interesting to note that the new rules allow a tax advisor who promotes transactions listed by the IRS as abusive, and who further fails to disclose as required by the rules, to retain half of the gross income collected by the advisor in relation to the transactions.

b. Promotion.—The Jobs Act also addresses § 6700 promotion penalties. Amended § 6700(a) provides for an increased penalty in an amount equal to fifty percent of the gross income derived from such activity by the person upon whom the penalty is imposed.[202] Under this new rule, even assuming that tax advisors involved in promoting future tax products intentionally made qualifying false or fraudulent statements, the penalty for making such a statement in connection with any of the investment plans generally does not exceed one half of the fees derived from promoting the transactions.[203] Again, together the four products generated fees for KPMG in excess of $124 million.[204] Under the new rule, if KPMG engaged in similar activities, KPMG would be subject to penalties in an amount approximately equal to $62 million. Although this penalty is substantially higher than the penalties imposed under prior law, the penalty allows future shelter promoters to retain half of the total fees collected in relation to their activities. While the penalty would serve as a deterrence to some promoters, others may view it only as a cost of doing business.[205]

The penalty for aiding and abetting with respect to an individual's tax liability is $1000.[206] The penalty increases to $10,000 if the aiding and abetting is with respect to a corporation's tax liability.[207] Again, KPMG's fees were in excess of $124 million.[208] If, for this purpose, we assume that there were 500 corporate taxpayers that had relied on the transactions to report reduced federal income taxes on their returns, the penalties imposed on KPMG for aiding and abetting would amount to no more than $5 million. The $5 million penalty would represent slightly more than four percent of the overall fees collected by

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201. *Id.* § 6707(b)(2)(B). The penalty increases to seventy-five percent where the transaction in question is a listed transaction and the taxpayer intentionally disregards the disclosure rule.

202. *Id.* § 6700(a)

203. *See id.*

204. ROLE OF ACCOUNTANTS, *supra* note 164, at 3.

205. *See* 150 CONG. REC. S11,191-203 (Oct. 11, 2004) (statement of Senator Levin indicating: "The amendment . . ., which became part of the Senate bill, set the penalty on an abusive tax shelter promoter at 100 percent of the fees earned from the abusive shelter. . . . But that provision was cut in half in this conference report, setting the penalty at 50 percent of the fees earned, meaning the promoters of abusive shelters get to keep half of their gain.").

206. I.R.C. § 6701(b)(1).

207. *Id.* § 6701(b)(2).

208. ROLE OF ACCOUNTANTS, *supra* note 164, at 3.

KPMG in the transaction. While four percent of the fees collected is not meaningless, it would also not appear to be the kind of penalty that might persuade would-be tax shelter promoters from engaging in promotion activities.

III. FOCUSING ON THE ETHICAL PROBLEM

Scholars and commentators have attempted to explain the recent increase in tax shelter activity by focusing on congressional inactivity, inadequacies in the judicially created tests for identifying tax motivated transactions, and an apparent failure on the part of practitioners to respect the relevant ethical rules imposed upon the profession. One commentator notes the recent resurgence of tax sheltering activity arguing that a "confluence of astonishing taxpayer sophistication and a host of tax avoidance opportunities buried in a bewilderingly complex [Code], along with a sentiment that the Code has become fundamentally unfair," has induced taxpayers to engage in tax motivated transactions.[209] The same commentator suggests the solution may lie not in attacking taxpayers' abilities to avoid or evade taxes, but in reducing their willingness to do so. Further, this "may require fundamentally rethinking U.S. taxation principals to focus on economic income or to abandon income as a tax base altogether."[210] In relation to judicial efforts, the United States Supreme Court appears to be reluctant to provide further guidance as to the definition of a sham transaction.[211]

Commentators have also pointed to the shift in the manner in which courts should interpret statutes focusing on textualist versus non-textualist points of view.[212] Generally, under the former theory, a textualist "searches for the meaning of words used in a statute," examining the text only.[213] In contrast, "non-textualists attempt to give effect to the legislature's intent by looking beyond the text of the relevant statute for evidence of that intent."[214] One commentator argues that under "the Supreme Court's recent trend of resolving tax cases using textualist interpretation methods, it is doubtful that the Court

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209. *Governmental Attempts to Stem the Rising Tide*, *supra* note 147, at 2249, 2254-55.

210. *Id.* at 2250-51.

211. *See, e.g.*, Winn-Dixie, Inc. v. Comm'r, 254 F.3d 1313 (11th Cir. 2001), *cert. denied*, 535 U.S. 986 (2002); Del Commercial Props. v. Comm'r, 251 F.3d 210 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 1104 (2002); ASA Investerlings P'ship v. Comm'r, 201 F3d 505 (D.C. Cir.), *cert. denied*, 531 U.S. 871 (2000); ACM P'ship v. Comm'r, 157 F.3d 231 (3d Cir. 1998), *cert. denied*, 526 U.S. 1017 (1999); Gardner v. Comm'r, 954 F.2d 836 (2d Cir.), *cert. denied sub nom.* Falk v. Comm'r, 504 U.S. 910 (1992); Cook v. Comm'r, 941 F.2d 734 (9th Cir.), *cert. denied*, 502 U.S. 857 (1991); Lerman v. Comm'r, 939 F.2d 44 (3d Cir.), *cert. denied*, 502 U.S. 984 (1991) Herrington v. Comm'r, 854 F.2d 755 (5th Cir. 1988), *cert denied*, 490 U.S. 1065 (1989).

212. *See* Allen D. Madison, *The Tension Between Textualism and Substance-Over-Form, Doctrines in Tax Law*, 43 SANTA CLARA L. REV. 699, 702-03 (2003).

213. *Id.* (citing Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23 (Amy Gutmann ed., 1997).

214. Madison, *supra* note 212, at 212.

would allow the standard sham transaction doctrine, the business purpose doctrine [or other judicially developed doctrines addressing tax motivated transactions] to stand."[215] Further, the commentator argued that the judicially created doctrines inappropriately override the text of the Code.[216] As such, the commentator concludes that if the Supreme Court were to overturn the judicially created sham doctrines, the goals of textualism would be served and more certainty would be imported into the tax law.[217]

Another commentator, Richard Lavoie, notes that strict statutory construction, as advanced by Justice Scalia and other Justices of the Supreme Court, is premised on a flawed perception that "ignores the law's cultural connection."[218] He argues that "[g]rowing acceptance of [textualism] within the judiciary has resulted in our society's laws becoming increasingly detached from our morals."[219] As such, "[i]ndividuals are freer to pursue actions offending our collective morality than in the recent past."[220] This, he argues, is because "the legal constraints on such actions are no longer permitted to draw strength from the moral constraints."[221] He argues that "tax shelter activity is completely ethical and appropriate under [the textualist approach] since the purpose of the law is irrelevant as long as the literal language of the statute is obeyed."[222]

This commentator first concludes that an attempt to reform tax law on an "ad-hoc basis" against each particular tax shelter is a losing battle due to the complexity of our tax system.[223] He argues that reforming the Tax Bar is also not likely to succeed under the textualist legal landscape because of the lucrative nature of tax shelter activities and the apparent acceptance of form over substance under the textualist approach.[224] Instead, reform must be focused on the judiciary.[225] As one solution, the commentator advocates that the legislature alter judicial behavior by adopting a "statutory general anti-abuse rule . . . effectively requir[ing] that the judiciary interpret the Code in light of its purpose and intent."[226] "Once the traditional approach to statutory construction is reaffirmed," so the argument goes, "the numerous constraints on unethical behavior that were weakened under [the textualist approach] should revive" and unethical behavior should correspondingly decrease.[227]

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215. *Id.* at 749.

216. *Id.*

217. *Id.* at 750.

218. Richard Lavoie, *Subverting the Rule of Law: The Judiciary's Role in Fostering Unethical Behavior*, 75 U. COLO. L. REV. 115, 118 (2004).

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 183-84.

223. *Id.* at 188.

224. *Id.* at 190.

225. *Id.* at 192-94.

226. *Id.* at 193-94.

227. *Id.* at 195.

Although both commentators address the rise of textualism in the judiciary as it relates to the judicially created sham transaction doctrine and tax shelter activities in general, they land at opposite ends of the spectrum. The first commentator accepts textualism and concludes that the judiciary should refrain from injecting its own interpretation of Congress's intent into the law in relation to tax shelters.[228] The second commentator, Lavoie, argues that by adhering to textualism, the judiciary has opened the door to manipulation and abuse of the literal meaning of the Code.[229] He argues by minimizing or eliminating the judiciary's ability to interpret the meaning of the law, the Code is open to strained interpretations that result in the allowance of tax motivated transactions.[230] In order to avoid this outcome, he proposes that Congress should codify the anti-abuse doctrines and enact a statute that induces the judiciary to engage in applying the Code based upon the intent of Congress in enacting the Code.[231] Thus, Lavoie would encourage the continued application of the judicially developed economic substance doctrines. He predicts that taxpayers contemplating engaging in sham transactions would be dissuaded by the increased risk that they would be found to be in violation of the substance of the law, rather than the letter of the law which is subject to manipulation.[232]

It is certainly possible that the recent trend toward a textualist approach within the Supreme Court is partially responsible for the increase in tax motivated transactions and the apparent ethical failure amongst tax advisors practicing in front of the Internal Revenue Service. However, this theory seems unlikely in that it contemplates that taxpayers believe the Supreme Court, if presented with a sham transaction, would not rely on its time tested decisions in *Gregory* and *Knetsch*.[233]

Similarly, the textualist theory presupposes that the judiciary's desire or ability to interpret the intent and meaning of the law has devolved to a point where the Court would only apply the rigid meaning of the Code without looking at the intent of the statute as required under the holding in *Gregory*.[234] Under the textualist theory, taxpayers would also have to conclude that the common law sham transaction doctrines no longer apply and that there has been a change at the very foundation of the Supreme Court's espousal of the rule in 1935 in its opinion in *Gregory*. No longer would a question for determination in sham cases be whether what was done, apart from the tax motive, was the thing which the statute intended.[235] For almost seventy years the Supreme Court has left unchanged, and the courts of appeal have diligently applied, some form of this

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228. *See* Madison, *supra* note 212, at 749.
229. Lavoie, *supra* note 218, at 118.
230. *Id.* at 192-94.
231. *Id.* at 193.
232. *Id.* at 195.
233. *See* discussion *supra* Part I.A.1.
234. Gregory v. Helvering, 293 U.S. 465, 469 (1935).
235. *Id.*

rule.[236] It is unreasonable to conclude that the Supreme Court would turn so abruptly away from this well reasoned rule. It is equally hard to imagine that taxpayers who contemplate engaging in a tax motivated transaction do not give credence to this rule which has been so consistently applied.

The increased activity is certainly due in part to an ethical lapse primarily caused by a group of professionals who do not adhere to the ethical rules imposed upon the profession. However, it is also likely that the increase in tax motivated transactions is due in part to the weakness in the economic substance prong of the sham transaction analysis allowing promoters to issue opinions that, at a minimum, operate to abate penalties as described earlier. A statement made in the report by the Minority Staff of the Senate Governmental Affairs Permanent Investigations Subcommittee frames the ethical scenario quite well. In summarizing the Committee's findings in relation to KPMG's recent tax shelter activities, the Report included the following statement:

> The tax products featured in this Report were developed, marketed, and executed by highly skilled professionals in the fields of accounting, law, and finance. Historically, such professionals have been distinguished by their obligation to meet a higher standard of conduct in business than ordinary occupations. When it came to decisions by these professionals on whether to approve a questionable tax product, employ telemarketers to sell tax services, or omit required information from a tax return, one might have expected a thoughtful discussion or analysis of the firm's fiduciary duties, its ethical and professional obligations, or what should be done to protect the firm's good name. Unfortunately, evidence of those thoughtful discussions was virtually non-existent and considerations of professionalism seem to have had little, if any, effect on KPMG's mass marketing of its tax products.[237]

Again, while the report focuses on the actions of KPMG, the report also confirms the participation of a number of other consultants in the promotion and execution of tax shelters. These activities are so well documented in the report

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236. *But see* Gitlitz v. Comm'r, 531 U.S. 206 (2001) (taxpayer received a double benefit under the plain reading of the Code). In *Gitlitz*, Justice Thomas found that the Code's "plain text" required the Court to uphold a tax loophole despite Justice Breyer's assertion that policy favored reading the statute to prevent the use of the loophole. *Id.* at 220, 223. *See also* Madison, *supra* note 212, at 740 (pointing out that the Supreme Court's plain reading in *Gitlitz* reveals a swing to the textualist approach in that it allowed a taxpayer to obtain a double tax benefit which has historically never been allowed even if the Code supported such treatment); Joseph Isenbergh, *Musings on Form and Substance in Taxation*, 49 U. CHI. L. REV. 859, 863-84 (1982) (criticizing the economic substance doctrine, arguing that the doctrine's articulation and the outcomes of cases such as *Gregory* and *Goldstein*, are incorrect and are the consequence of judicial ambition or impatience); Coltec Indus. v. United States, 62 Fed. Cl. 716, 756 (2004) ("Under our time-tested system of separation of powers, it is Congress, not the court, that should determine how the federal tax laws should be used to promote economic welfare.").

237. ROLE OF ACCOUNTANTS, *supra* note 164, at 16.

that little doubt is left that there is a systematic involvement of a wide variety of professions in varying industries in tax shelter promotion. The Report reveals a consistent abuse of law and ethics by many participants. The abuses are a result of the unlawful, unethical, and aggressive nature in which such firms are marketing highly structured tax motivated transactions.

IV. SPECIFIC ETHICAL ISSUES

Again, using the facts surrounding the Committee's investigation into recent tax shelter activities as a case study, the activities of KPMG, the law firm, and other professionals appear to be in violation of the ABA Model Rules of Professional Conduct (MRPC) that govern the practice of law and also appear to be in violation of Circular 230 governing practice in front of the IRS. It is important to note in relation to the following discussion that while certain provisions of the Jobs Act addressed the disqualification of opinions under various circumstances, such provisions are intended to focus on a taxpayer's ability to avoid understatement penalties under certain circumstances. The following discussion addresses the current ethical rules in relation to practitioners who seek to advise in the area of tax motivated transactions. In relation to tax practitioners, the Jobs Act made one important amendment to Circular 230 which the following discussion addresses.

A. Rules of Professional Conduct

Some courts may consider Sidley Austin Brown & Wood's tax opinions provided to various taxpayers to be incompetent under the MRPC. MRPC Rule 1.1 provides that a lawyer shall provide competent representation to a client.[238] Competent representation requires the legal knowledge, skill, thoroughness, and preparation necessary for the representation.[239] Generally, "competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem."[240]

The prototype tax opinion contained no application of facts to the law.[241] A determination as to whether the proposed transactions marketed by KPMG met both prongs of the sham transaction analysis requires a lengthy analysis of whether a pre-tax profit or a nontax business purpose exists. While Sidley Austin Brown & Wood's tax opinion addressed the law in relation to economic substance and business purpose, the opinion relied solely on a representation on the part of the client and the investment advisors that there was a reasonable opportunity to earn a reasonable pre-tax profit from the transactions. No specific facts supporting the conclusion that the transaction would meet the two pronged sham transaction analysis were indicated in the opinion. In fact, according to the

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238. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2003).

239. *Id.*

240. *Id.*, cmt. 5.

241. *See* ROLE OF ACCOUNTANTS, *supra* note 164, at 11; *see also* KPMG's Tax Opinion Letter, *supra* note 173.

Report, the evidence provided to the Committee indicated that KPMG obtained the client's opinion letter from the law firm and delivered it to the client without the client actually speaking to any of the lawyers at the law firm.[242] The lack of any apparent communication with the client or independent analysis of the facts by the law firm would appear to completely disregard the Rule 1.1's requirement that there be an inquiry into the factual elements of the legal problem.

B. Circular 230

Section 330 of Title 31 of the United States Code authorizes the Secretary of the Treasury to regulate the practice of representatives before the Treasury Department.[243] Thus, under federal law, the Treasury Department has the right to promulgate rules of practice and to censure, including suspension or termination of practice rights, individuals who are authorized to practice before the IRS for incompetent or disreputable conduct.[244] Certified public accountants and attorneys are among those who are authorized to practice in front of the IRS.[245] The Treasury Department regulations governing the practice of certified public accountants, attorneys, and other professionals in front of the IRS are found at Title 31 of the Code of Federal Regulations, Subtitle A, part 10 and these rules are commonly referred to as "Circular 230."[246] Representatives of KPMG[247] and Sidley Austin Brown & Wood are subject to the rules under Circular 230 governing the practice of accountants and lawyers in front of the IRS.

On December 20, 2004, the Department of the Treasury finalized new

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242. ROLE OF ACCOUNTANTS, *supra* note 164, at 93.

243. *See* 31 U.S.C § 330 (2000).

244. *See* 31 C.F.R. §10.50 (2005); *see also* Steven C. Salch, *Tax Practice Ethics: Practitioner Discipline and Sanctions*, SH080 ALI-ABA 543, 547 (2003).

245. *See* 31 C.F.R. § 10.3(b).

246. *See id.* § 10.0.

247. The issue of whether KPMG or representatives of KPMG are subject to the rules of professional conduct imposed by each state relates to whether professionals representing KPMG are "engaged in the practice of law" under the relevant rules of each state. Generally, engaging in the practice of law in any manner, unless licensed or authorized, is statutorily prohibited. *See, e.g.*, Florida Bar v. Sperry, 140 So. 2d 587, 588 (Fla. 1962); N.Y. County Lawyers Ass'n v. Bercu, 78 N.Y.S.2d 209, 211 (1948). For example, the State of New York follows the "incidental" or "public interest" approach. 78 N.Y.S.2d at 216, 220. The incidental approach as applied in New York allows a certified public accountant to perform legal services or give legal advice to clients that are incidental to the accountant's work. *Id.* For example, an accountant employed to keep a taxpayer's books, audit taxpayer's financials, or file his tax returns would be permitted to answer legal questions arising out of and incidental to the accounting work. *Id.* To the extent that a CPA firm has been retained to provide tax return services to a client, the CPA firm would appear to be authorized to provide advice arising out of filing of the client's return. It is unclear whether a CPA appropriately providing tax advice to a client in relation to preparation of the client's return is subject to the New York rules of professional conduct.

regulations under Circular 230 (the "New Regulations").[248] Prior to the effective date of the New Regulations, old section 10.33(a) specifically required diligence as to accuracy of the facts surrounding a tax shelter[249] opinion[250] and provided that a practitioner who provides a tax shelter opinion analyzing the federal tax effects of a tax shelter investment shall comply with several requirements.[251] Old section 10.33(a)(1) pertained to factual matters and required among other things that "a practitioner must make inquiry as to all relevant facts, be satisfied that the material facts are accurately and completely described in the offering materials, and assure that any representations as to future activities are clearly identified, reasonable and complete."[252] The KPMG and Sidley Austin Brown & Wood tax opinions did not identify any specific facts in relation to the client. The opinions do not reflect any effort on the part of KPMG or Sidley Austin Brown & Wood to inquire as to any of the relevant facts surrounding the transaction. Rather, the opinions avoid any actual application of existing law to specific facts, apparently transferring the risk of such analysis to the prospective client, which is required to represent that they have done that analysis.

Old section 10.33(a)(1)(ii) provided that a practitioner could not accept as true "asserted facts pertaining to the tax shelter which he/she should not, based on his/her background and knowledge, reasonably believe to be true."[253] However, under old section 10.33 a practitioner was not required to "conduct an audit or independent verification of the asserted facts, or assume that a client's statement of the facts could not be relied upon, unless he/she had reason to believe that any relevant facts asserted to him/her were untrue."[254] Under the old

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248. T.D. 9165, 69 Fed. Reg. 75839 (Dec. 20, 2004).

249. *See* 31 C.F.R. § 10.33(c)(2) (defining a "tax shelter" as, among other things, "an investment which has as a significant and intended feature for Federal income or excise tax purposes either of the following attributes: (i) Deductions in excess of income from the investment being available in any year to reduce income from other sources in that year, or . . .") (current section 10.33 will be replaced by new section 10.33 effective 180 days after publication of the new regulations in the federal register).

250. *See id.* § 10.33(c)(3) (generally defining a "tax shelter opinion" as "advice by a practitioner concerning the Federal tax aspects of a tax shelter either appearing or referred to in the offering materials, or used or referred to in connection with sales promotion efforts, and directed to persons other than the client who engaged the practitioner to give the advice. The term includes the tax aspects or tax risks portion of the offering materials prepared by or at the direction of a practitioner, whether or not a separate opinion letter is issued or whether or not the practitioner's name is referred to in the offering materials or in connection with the sales promotion efforts. In addition, a financial forecast or projection prepared by a practitioner is a tax shelter opinion if it is predicated on assumptions regarding Federal tax aspects of the investment, and it meets the other requirements of the first sentence of this paragraph") (current section 10.33 will be replaced by new section 10.33 effective 180 days after publication of the new regulations in the federal register).

251. *Id.* § 10.33(a) (former regulation, still currently in effect).

252. *Id.* § 10.33(a)(1)(i) (former regulation, still currently in effect).

253. *Id.* § 10.33(a)(1)(ii) (former regulation, still currently in effect).

254. *Id.*

rule, the IRS could determine that representatives of KPMG who promoted various tax products and provided opinions could not have concluded on the veracity of facts where none were established. On the other hand, the exception in the rule relieving the practitioner of the duty to verify facts left this conclusion in question. It would appear also that where no facts were adduced in arriving at an opinion, but rather the client represented facts, neither KPMG nor Sidley Austin Brown & Wood were required to conduct an audit or independently verify asserted facts. Under the exception provided in the rule, it is ambiguous as to whether the opinion provider could rely on the representation by the client of the ultimate facts needed to arrive at an opinion.

The question then becomes whether representatives of both KPMG and Sidley Austin Brown & Wood had an obligation to verify whether the ultimate facts relating to economic substance asserted in the representations by the taxpayers in the opinions were accurate. Stated otherwise, did the professional firms have an affirmative obligation to verify that there was a reasonable opportunity to earn a reasonable pre-tax profit from the transaction in excess of all associated fees and costs?

Notice 84-4, originally adding old section 10.33 to the regulations, contains specific comments in relation to due diligence as to factual matters.[255] The notice indicates the applicable standards in this area generally were the same as those set forth in ABA Formal Opinion 346.[256] ABA Formal Opinion 346 provided that:

> [T]he lawyer should . . . make inquiry of his client as to the relevant facts and receive answers. If any of the alleged facts, or the alleged facts taken as a whole, are incomplete in a material respect; or are suspect; or are inconsistent; or either on their face or on the basis of other known facts are open to question, the lawyer should make further inquiry. The extent of this inquiry will depend in each case upon the circumstances; for example, it would be less where the lawyer's past relationship with the client is sufficient to give him a basis for trusting the client's probity than where the client has recently engaged the lawyer, and less where the lawyer's inquiries are answered fully than when there appears a reluctance to disclose information.
>
> Where the lawyer concludes that further inquiry of a reasonable nature would not give him sufficient confidence as to all the relevant facts, or for any other reason he does not make the appropriate further inquiries, he should refuse to give an opinion. However, assuming that the alleged facts are not incomplete in a material respect, or suspect, or in any way inherently inconsistent, or on their face or on the basis of other known facts open to question, the lawyer may properly assume that the facts as related to him by his client, and checked by him by reviewing such

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255. I.R.S. Notice 84-4, 1984-1 C.B. 331 (1984).

256. *Id.*

appropriate documents as are available, are accurate.[257]

The spirit of ABA Formal Opinion 346 is not to simply accept a representation of the ultimate fact from a client which the firm issuing the opinion had no prior contact with. Rather, in those instances where KPMG had no previous contact or relationship with a client that purchased a tax product from KPMG, it would have been incumbent upon KPMG to inquire as to all relevant facts which would allow KPMG to ultimately conclude that the transaction proposed in the tax product had economic substance. Further, the spirit of Formal Opinion 346 appears to indicate that the exception to verifying the facts only exists where the facts are not incomplete or inconsistent. In the case of a tax product such as those promoted by KPMG, it is unlikely that either KPMG or Sidley Austin Brown & Wood could conclude that the facts were so complete and consistent that there was no need to further investigate.

Apparently recognizing a deficiency in the current rules, on December 8, 2004, the IRS approved final regulations containing several changes and amendments to Circular 230.[258] The final regulations replace old section 10.33 with a new section 10.33 containing a set of "best practices" for all tax advisors. The purpose of new section 10.33 is to restore, promote, and maintain the public's confidence in the honesty and integrity of the professionals providing tax advice.[259]

In order to accomplish this goal, new section 10.33 provides, among other things, a number of statements that are purely aspirational.[260] Section 10.36(a)

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257. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 346 (1982).

258. T.D. 9165, 69 Fed. Reg. 75839 (Dec. 20, 2004) (approved Dec. 8, 2004).

259. *Id.*

260. Specifically, new section 10.33 will provide:

> Best practices for tax advisors.
>
> (a) *Best practices.* Tax advisors should provide clients with the highest quality representation concerning Federal tax issues by adhering to best practices in providing advice and in preparing or assisting in the preparation of a submission to the Internal Revenue Service . . . . best practices include the following:
>
> (1) Communicating clearly with the client regarding the terms of the engagement. For example, the advisor should determine the client's expected purpose for and use of the advice and should have a clear understanding with the client regarding the form and scope of the advice or assistance to be rendered.
>
> (2) Establishing the facts, determining which facts are relevant, evaluating the reasonableness of any assumptions or representations relating to applicable law (including potentially applicable judicial doctrines) to the relevant facts, and arriving at a conclusion supported by the law and the facts.
>
> (3) Advising the client regarding the import of the conclusions reached, including, for example, whether a taxpayer may avoid penalties under the Internal Revenue Code if a taxpayer acts in reliance on the advice.
>
> (4) Acting fairly and with integrity in practice before the Internal Revenue Service.

Id. at 3.

generally provides that firms engaged in providing advice concerning tax issues or preparing submissions to the IRS should take reasonable steps to ensure that the firm's procedures are consistent with the best practices.[261] However, section 10.36(a) does not subject practitioners to discipline for failing to comply.

While laudable, the aspirational list of best practices is unlikely to thwart tax shelter activity. In its investigation, the Report issued by the Senate Subcommittee Minority Staff indicates that KPMG took measures to hide its tax product activities from the IRS and the public.[262] As of the date of the Report, despite having an inventory of 500 tax products, KPMG had never registered, and thereby never disclosed to the IRS the existence of, a single one of its tax products.[263] The Report indicates that KPMG professionals concluded that KPMG should ignore the federal tax shelter requirements, even if required by law, because the penalties associated with the failure to comply were substantially less than the fees received from clients engaging KPMG to implement its tax products.[264] Penalties associated with failure to disclose under the Jobs Act continue to be substantially less than the fees received from clients. If tax shelter promoters are primarily concerned with the penalty cost versus fee benefits of promoting shelters, it would appear unlikely that they will alter their activities based upon the breach of aspirational ethical considerations.

While new section 10.33 is aspirational, new section 10.35 contains specific requirements for "covered opinions" that, if not respected, will subject practitioners to discipline under the rules.[265] The new rules replace old section 10.33 with new section 10.35 prescribing diligence requirements for practitioners providing covered opinions.[266] New section 10.35(c)(1)(ii) and (iii) state:

> (ii) The practitioner must not base the opinion on any unreasonable factual assumptions (including assumptions as to future events). An unreasonable factual assumption includes a factual assumption that the practitioner knows or should know is incorrect or incomplete. For example, it is unreasonable to assume that a transaction has a business purpose or that a transaction is potentially profitable apart from tax benefits. A factual assumption includes reliance on a projection, financial forecast or appraisal. It is unreasonable for a practitioner to rely on a projection, financial forecast or appraisal if the practitioner knows or should know that the projection, financial forecast or appraisal is incorrect or incomplete or was prepared by a person lacking the skills or qualifications necessary to prepare such a projection, financial forecast or appraisal. The opinion must identify in a separate section all factual assumptions relied upon by the practitioner.

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261. 31 C.F.R. § 10.36 (2005).

262. *See* ROLE OF ACCOUNTANTS, *supra* note 164, at 10.

263. *Id.*

264. *See id.* at 13.

265. *See* 31 C.F.R. § 10.52(a).

266. *Id.* § 10.35(a), (c)(1).

> (iii) The practitioner must not base the opinion on any unreasonable factual representations, statements or findings of the taxpayer or any other person. An unreasonable factual representation includes a factual representation that the practitioner knows or should know is incorrect or incomplete. For example, a practitioner may not rely on a taxpayer's factual representation that a transaction has a business purpose if the representation does not include a specific description of the business purpose or the practitioner knows or should know that the representation is incorrect or incomplete. The opinion must identify in a separate section all factual representations, statements or findings of the taxpayer relied upon by the practitioner.[267]

Additionally, the new regulations require practitioners to relate the applicable law to the relevant facts and prohibit practitioners from assuming the favorable resolution of any material federal tax issue or otherwise base opinions on unreasonable legal assumptions, representations, or conclusions.[268] For instance, under section 10.35 the IRS attempts to prevent practitioners from relying upon client representations as to the factual existence of a business purpose and economic substance of a transaction.

Further, the new regulations attempt to identify the characteristics of covered tax shelter style opinions and require practitioners to: (1) identify and consider all relevant facts and not rely on any unreasonable factual assumptions or representations; (2) relate the applicable law (including potentially applicable judicial doctrines) to the relevant facts and not rely on any unreasonable legal assumptions, representations, projections, or conclusions; (3) consider all material federal tax issues and reach a conclusion, supported by the facts and the law, with respect to each material federal tax issue; and (4) provide an overall conclusion as to the federal tax treatment of the tax shelter item or items and the reasons for that conclusion.[269] All of these requirements help clarify the existing ethical requirements for issuing tax shelter opinions.

However, the existing and new regulations again fall short of seriously dissuading participants in the tax shelter promotion arena from continuing to issue opinions similar to those recently issued by KPMG and Sidley Austin Brown & Wood. The suggested changes to Circular 230 do not directly target the apparent unethical behavior associated with the issuance of a "covered" tax shelter styled opinion that does not meet the standard of a transaction with economic substance and a legitimate nontax business purpose. Rather, the new rules attempt to outline what content is required in a tax shelter opinion to pass under the ethical rules. Absent is any definition of what constitutes an unacceptable opinion in relation to the relevant legal standard for purposes of the ethical rules.

Also absent from the existing regulations are any sanctions for issuance of

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267. *Id.* § 10.35(c)(1)(ii)-(iii).

268. *Id.* § 10.35(c)(2).

269. *Id.* § 10.35(c).

a tax shelter opinion that improperly concludes that the transaction has either economic substance and/or a legitimate nontax business purpose. Apparently recognizing the absence of any monetary sanctions in the regulations or a lack of any authority to sanction practitioners, Congress did in fact amend § 330(b) of Title 31 via the Jobs Act to authorize the Secretary to impose a monetary penalty on individuals practicing in front of the Treasury Department.[270] Section 330(b) now specifically provides:

> The Secretary may impose a monetary penalty on any representative described in the preceding sentence. If the representative was acting on behalf of an employer or any firm or other entity in connection with the conduct giving rise to such penalty, the Secretary may impose a monetary penalty on such employer, firm, or entity if it knew, or reasonably should have known, of such conduct. Such penalty shall not exceed the gross income derived (or to be derived) from the conduct giving rise to the penalty and may be in addition to, or in lieu of, any suspension, disbarment, or censure of the representative.[271]

Importantly, the sanction is limited to situations where the practitioner is found to be incompetent, disreputable, in violation of regulations prescribed under Circular 230, or who is found to have willfully and knowingly threatened or mislead the person being represented with intent to defraud.[272] While no regulatory guidance has yet been issued in relation to the amendment, it is clear that the Secretary of the Treasury now has authority to impose a monetary sanction on those who practice in front of the IRS. To the extent that would-be tax shelter promoters can be held liable for the sanctions up to an amount equal to one hundred percent of the fees collected, this sanction in and of itself may operate to dissuade promoters much more than the new penalty provisions within the Jobs Act.

Other than the possibility of being sanctioned under amended § 330, there is little in the amendments to Circular 230 that will deter practitioners from issuing tax shelter opinions that meet the requirements of section 10.35 but do not meet the applicable judicial standards. Worse yet, the current standards under Circular 230 are less stringent than requirements under the Jobs Act in relation to opinions issued by tax advisors that will support an argument that the taxpayer meets the reasonable cause exception.

V. PROPOSED SOLUTION

On January 31, 2004, the Chief of Staff of the Joint Committee on Taxation (the "Chief of Staff") asked members of the American Bar Association Section of Taxation to comment upon how lawmakers should address tax shelter

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270. *See* 31 U.S.C. § 330(b) (West, WESTLAW through P.L. 109-2, Feb. 18, 2005).

271. *Id.*

272. *Id.*

transactions.[273] In his speech, the Chief of Staff indicated that disclosure is not enough to tackle the kinds of tax shelters that are being marketed.[274] He indicated that a substantive change in the law is required and the change should take the form of a general standard rather than a specific rule. The Chief of Staff indicated that standards are deficient because they lack certainty and involve discretion.[275] Finally, he indicated that the solution should lack such disadvantages.[276] The new provisions within the Jobs Act do not have such qualities. They do not take the form of a general standard. Rather, they appear to be a group of specific rules that increase the focus on, among other things, disclosure and the dollar amounts of the penalties.[277]

The sham transaction doctrine contemplates a determination of whether the transaction itself has economic substance and a legitimate nontax business purpose. The analysis unavoidably requires uncertainty and discretion. Tax shelter opinions invariably arrive at a conclusion that the proposed transaction more probably than not satisfies either or both the business purpose and the economic substance requirement. But in many instances, the courts and the IRS have determined that the very same transactions opined upon are abusive sham transactions. The facts surrounding the development, purchase, implementation and ultimate determination that a tax product is a sham occurs over and over again, and with taxpayers historically avoiding payment of any penalty for engaging in such conduct.

Under the new law, taxpayers who would engage in tax motivated transactions may or may not be more likely to obtain an opinion from a tax advisor depending on whether they are induced to disclose under the new rules. Further, if disclosure is made, opinions sought will likely be more replete with facts to support opinion conclusions. However, even assuming these desirable consequences come to pass, aggressive taxpayers and their advisors are likely to be more focused on the decision of whether they will disclose. Taxpayers may disclose and argue that the transaction is not a sham in court under the judicially created doctrines. Given the low threshold that is needed to meet the economic substance prong of the sham transaction doctrine, taxpayers will perceive a reasonable probability of success. On the other hand, if sufficient tax dollars are at stake, they may choose not to disclose the transaction, increase the odds against the IRS's discovery of the transaction, and position for the same contest in court. In this case, the odds of success will be the same but the stakes will be higher pursuant to the increased understatement penalties which may be unavoidable if the taxpayer loses in court.

The IRS's main Code deterrent with respect to the taxpayer is the imposition

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273. *See* George K. Yin, Remarks at American Bar Association Tax Law Conference (Jan. 31, 2004); *JCT's Yin Requests Tax Bar Suggestions on How to Address Shelters*, 2004 TAX NOTES TODAY 22-14.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

of the twenty or new thirty percent accuracy-related penalty under §§ 6662 and 6662A. The imposition of the twenty or thirty percent penalty may still be thwarted in the tax shelter arena by the fact that the taxpayer has disclosed the transaction and obtained an appropriate opinion from a qualified tax advisor. Given the multitude of extremely complex transactions that are created and promoted by highly educated professional advisors, the new laws may induce a large quantity of disclosures. If widespread disclosure is indeed the result, an already understaffed and under-funded IRS may find it hard to procure sufficient resources to analyze and pursue every transaction disclosed. Alternatively, given the aggressive nature of taxpayers as evidenced in the Committee's 2002 Report, the possibility remains if the tax dollars are sufficiently high, that taxpayers will choose not to disclose and rely upon their prospects of success in arguing under the judicial doctrine that the transaction is not a sham. Regardless of the IRS's resources, without clarification via codification of the judicially created economic substance doctrine, it will be an uphill task for the IRS to challenge transactions wherein a taxpayer asserts that it has satisfied the economic substance doctrine—whether or not disclosure took place.

It is for these reasons that the author recommends codification and clarification of the economic substance prong of the sham transaction doctrine. The proposed codification by the Senate in the Jobs Act, requiring that a taxpayer prove that the present value of expected pre-tax profit is substantial in relation to the expected net tax benefits, would have a positive deterrent effect.[278] This is due to the fact that taxpayers would not be able to argue that a transaction has economic substance where there is only a slim possibility that nontax profits will exceed transaction costs.

Further, the § 6662A penalty provisions, applicable to taxpayers, and Circular 230, applicable to practitioners, create a symbiotic relationship between taxpayers who seek to engage in tax shelter transactions and practitioners who seek to advise and opine upon such transactions. Congress has recognized this relationship and taken an initial step toward solving the problem by amending the Code to authorize the Secretary of the Treasury to impose a monetary sanction on practitioners who practice before the IRS.[279] While this step is highly commendable, it continues, in the author's opinion, to fall short of actually penalizing practitioners. This is because promoters who practice in front of the IRS may abide by the rules and regulations under Circular 230 and avoid the possibility of a total 100% sanction. At the same time, such promoters can continue to choose not to disclose in violation of the new disclosure requirements. However, it is not clear whether a failure to disclose a transaction would amount to an action that is found to be, for instance, incompetent, disreputable, or in violation of regulations prescribed under Circular 230. Thus, it is possible for taxpayers and practitioners to avoid detection through nondisclosure and, if caught, be found to be in violation of the Internal Revenue Code but not the Circular 230 rules.

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278. *See supra* Part I.B.1.a.

279. *See* 31 U.S.C. § 330(b) (West, WESTLAW through P.L. 109-2, Feb. 18, 2005).

One method of remedying this shortfall which leaves less discretion or uncertainty is to treat the relationship between a practitioner that issues a tax shelter opinion and the taxpayer that relies on the opinion as interconnected in relation to the Circular 230 sanction and Code penalty provisions. This can be accomplished, for example, by imposing the new monetary sanctions upon practitioners who issue tax opinions with respect to transactions that are later determined to be in violation of the disclosure provisions applicable to tax advisors under the Internal Revenue Code. In instances where a taxpayer and his or her advisor decide not to disclose the transaction, the taxpayer would be subject to the increased thirty percent penalty for understatements and all the fees earned by a practitioner would be forfeited under the sanction. After all, why should a tax advisor be able to avoid the monetary sanction in instances where they choose not to abide by the Code's disclosure provisions?

Further, if a disclosed transaction which is the subject of a tax shelter opinion is determined to be abusive by a court, the penalty could apply to the taxpayer or its tax advisor jointly and severally. The penalty or sanction upon a practitioner issuing such an opinion could, for example, be equal to the twenty or thirty percent understatement penalty that is otherwise being avoided by a taxpayer by obtaining a tax opinion. The imposition of this penalty may be limited only to those practitioners that engage in providing tax shelter style opinions. Thus, the penalty would not apply to those practitioners that endeavor to provide tax advice outside of the tax shelter arena.

The possibility of an ethical sanction imposed upon the practitioner plus a monetary penalty imposed jointly upon either the client or the practitioner injects a level of risk in the tax shelter arena that most practitioners and clients will not want to take unless they are quite sure of their legal analysis. The result will no longer be a simple financial wash of tax and interest that otherwise would have been paid in the absence of the transaction. Rather, a penalty will be imposed on one of the participants.

CONCLUSION

As revealed by the recent activities and practices of numerous professional firms, the marketing of tax motivated transactions to taxpayers has become a big business, resulting in a large cost to the federal government in the form of lost tax revenues. The success of tax shelter promoters and taxpayers who reduce their federal tax liability through the use of highly structured transactions in violation of the spirit of the tax laws undermines the integrity and fairness of the federal tax system.

The success of the promoters and taxpayers who would game the system with such transactions is due in part to the fact that the judicial doctrines developed over time to identify such transactions have not set a clear deterrence standard. Specifically, the economic substance prong of the judicially developed sham transaction requiring a minimal amount of profit allows taxpayers and their advisors to succeed in making creative but unlikely arguments under an uncertain standard. The very existence of such an argument injects sufficient uncertainty under the current Code and Treasury regulations to allow taxpayers to

consistently avoid penalties in relation to such transactions. In order to avoid this unacceptable consequence, Congress should codify and clarify the economic substance doctrine.

Further, the current regulatory regime under the Internal Revenue Code and the ethical sanctions under Circular 230 are not in harmony. Due to the unavoidable relationship between taxpayers and their advisors, the monetary sanction authority granted to the IRS under the Jobs Act should be amended to make it applicable in instances wherein an advisor ignores the requirements under the Code as well as under Circular 230.

MEETING EXPECTATIONS: TWO PROFILES FOR SPECIFIC JURISDICTION

LINDA SANDSTROM SIMARD*

INTRODUCTION

The array of decisions in *Gator.com v. L.L. Bean*[1] is a recent illustration of the complexity and confusion that plague the doctrine of personal jurisdiction. Contending with one of the most pressing issues concerning the doctrine, the Ninth Circuit in Gator was faced with deciding the scope of authority that should arise from L.L. Bean's purposeful, but limited, contacts with California. The facts of the case posed an interesting twist on the typical personal jurisdiction scenario. The plaintiff, Gator.com ("Gator"), was a software distributor that develops software to monitor Internet purchasing patterns. The software (sometimes referred to as "spyware" or "adware") was distributed to consumers' computers (often without the consumer's knowledge or consent) when a consumer made a purchase over the Internet. The software tracked the consumer's Internet purchases and monitored the Web sites that were visited. When the software recognized the Web site of a target store, it "display[ed] a pop-up window offering a discount coupon for a competitor."[2] The case involved a Gator software product that identified L.L. Bean ("Bean") as a target company.[3] When Bean learned that it was a target company and that the software was offering Eddie Bauer coupons to individuals who visited the Bean Web site, Bean sent a cease and desist letter to Gator. Gator responded by filing a declaratory judgment action to establish the legality of its software. Gator filed the action in its home forum of California and sought to hail Bean across the country to litigate the issue.[4] Not surprisingly, Bean moved to dismiss the case for lack of personal jurisdiction, arguing that while it regularly sells products to California residents, these contacts are not sufficient to hail it into a federal court in California to litigate the intellectual property and unfair competition issues raised by Gator's software products. The United States District Court agreed with Bean and dismissed the case for lack of specific or general jurisdiction.[5]

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1. No. C01-01126 MEJ, 2001 U.S. Dist. Lexis 19737 (N.D. Cal. Nov. 21, 2001), *rev'd*, 341 F.3d 1072 (9th Cir. 2003), *vacated by, reh'g, en banc, granted*, 366 F.3d 789 (9th Cir. 2004).

2. *Gator.com Corp.*, 341 F.3d at 1075.

3. *Id.*

4. *Id.* Bean is incorporated and has its principle place of business in Maine.

5. *Id.*

The Ninth Circuit reversed the district court decision, holding that Bean was subject to general jurisdiction in California, largely on the basis of a finding that it maintained a "virtual store" in California through its interactive Web site.[6] Several months later, however, the Ninth Circuit vacated its decision and ordered a rehearing enbanc.[7] After the parties briefed the issue and the en banc court heard oral argument, the parties reached a settlement agreement and the court dismissed the appeal as moot, leaving the parties and legal community without an answer to this pressing issue.[8]

While the Bean case represents one of the most recent examples of the inconsistency found in personal jurisdiction cases, it is not the only such example.[9] These cases, and many others, illustrate that the doctrine of personal jurisdiction is largely in a state of disarray. Notwithstanding the murkiness of the minimum contacts doctrine,[10] the Supreme Court has signaled no major changes in the basic structure of personal jurisdiction doctrine.[11] As noted by Professor Moore, "[t]he dictates of minimum contacts are so deeply imbedded in the jurisprudence of personal jurisdiction as to make their abandonment

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6. *Id.* at 1079. Other factors included non-Internet sales to California residents, soliciting business in California and serving the market in California. *Id.* at 1078.

7. Gator.com Corp. v. L.L. Bean, Inc., 366 F.3d 789 (9th Cir. 2004).

8. Gator.com Corp. v. L.L. Bean, Inc., 398 F.3d 1125 (9th Cir. 2005) (en banc).

9. *See* Lakin v. Prudential Secs., Inc., 348 F.3d 704, 706, 708 n.7 (8th Cir. 2003) (holding that general jurisdiction may be present where the defendant maintains 1% of its loan portfolio with citizens of the forum state); Nichols v. G.D. Searle & Co., 991 F.2d 1195, 1200 (4th Cir. 1993) (rejecting general jurisdiction where 2% of total sales were in forum; rejecting specific jurisdiction because product liability suit did not "arise out of the defendant's activities in the forum"); Dalton v. R & W Marine, Inc., 897 F.2d 1359, 1362 (5th Cir. 1990) (rejecting general jurisdiction where 13% of total revenues occurred in the forum; specific jurisdiction not argued); Mich. Nat'l Bank v. Quality Dinette, Inc., 888 F.2d 462, 465-66 (6th Cir. 1989) (holding defendant subject to general jurisdiction in Michigan where 3% of its total sales were in Michigan); Provident Nat'l Bank v. Cal. Fed. Sav. & Loan Assoc., 819 F.2d 434, 437-38 (3d Cir. 1987) (holding that loans to Pennsylvania citizens which amounted to .083 of its total loan portfolio, plus other contacts, was sufficient to give rise to general jurisdiction in Pennsylvania; specific jurisdiction not argued); Stairmaster Sports/Med. Prods., Inc. v. Pac. Fitness Corp., 916 F. Supp. 1049, 1052-53 (W.D. Wash. 1995), *aff'd*, 78 F.3d 602 (Fed. Cir. 1996) (unpublished table decision) (rejecting general jurisdiction where 3% of total sales occurred in forum; rejecting specific jurisdiction over patent infringement claim where the defendant sent letters into the forum threatening litigation for infringement in part because the letters had no substantive bearing on the infringement issue).

10. Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 320 (2002) (asserting that "our current territorially based rules for jurisdiction (and conflict of laws) were developed in an era when physical geography was more meaningful than it is today" and as such we must reevaluate the theoretical foundation for personal jurisdiction).

11. Lawrence W. Moore, *The Relatedness Problem in Specific Jurisdiction*, 37 IDAHO L. REV. 583, 598 (2001) (noting that there is little likelihood of changing the basic doctrinal framework, no matter how "architecturally grotesque" it may be).

unrealistic."[12] Thus, the challenge is to provide meaningful criteria for the application of the basic doctrinal framework that has been the law of the land since *International Shoe*.

In an effort to provide doctrinal guidance, this Article suggests that we should focus attention on refining the scope and limits of specific jurisdiction, thereby avoiding the temptation to dilute the standards for general jurisdiction. Part I of the Article describes the existing framework of personal jurisdiction and Part II elaborates on the problem that exists in differentiating between general and specific jurisdiction. Part III then describes and critiques the leading theories which attempt to define the scope of specific jurisdiction and concludes that while each theory offers insight into the problem, none of them offers a comprehensive definition of the scope of specific jurisdiction that is appropriate for every factual scenario. Recognizing that the Due Process Clause strives to provide defendants with the ability to predict and control their jurisdictional exposure, Part IV suggests that the scope of jurisdiction arising from a particular forum contact should approximate the defendant's expectation that it might be hailed into that forum for an occurrence that it could anticipate arising from the forum contacts. The Article then suggests that a critical aspect of a defendant's expectation of jurisdiction depends upon whether the defendant's contacts with the forum are limited in time and purpose ("episodic contacts") or whether the defendant has created an ongoing and systematic relationship with the forum ("systematic contacts").[13] Finally, the Article provides a profile for determining the scope of specific jurisdiction for each of these types of contacts and discusses various applications of the profile.

I. THE *INTERNATIONAL SHOE* FRAMEWORK OF PERSONAL JURISDICTION

In 1945, the Supreme Court radically changed the doctrine of personal jurisdiction to incorporate what has become known as the minimum contacts doctrine. The premise of the doctrine is concisely stated in one sentence from the Court's opinion in *International Shoe Co. v. Washington*:

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[14]

Although the Court provided no specific criteria to define "traditional notions of fair play and substantial justice," it offered several jurisdictional landmarks to help courts navigate the uncertain waters.[15] First, a state may never exercise

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12. *Id.*

13. This Article assumes that there is a category of ongoing and systematic contacts which are not substantial enough to justify general jurisdiction.

14. 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

15. *Id.* at 316-17; Linda Sandstrom Simard, *Hybrid Personal Jurisdiction: It's Not General*

jurisdiction over a defendant who has no contacts, ties, or relations to the state.[16] Second, if a defendant has one or more contacts with a state, the state may be able to subject the defendant to jurisdiction for suits arising out of or relating to the forum state contacts.[17] Third, if a defendant maintains continuous and substantial contacts with a state, the state will likely be permitted to exercise jurisdiction over the defendant for claims that arise out of or are connected to the contacts, and the state may even be able to exercise jurisdiction over the defendant for claims that are entirely unrelated to the forum state activities.[18]

Nearly a quarter of a century after *International Shoe*, two celebrated Harvard Law School professors refined the doctrine by theorizing that every assertion of personal jurisdiction could be neatly classified into one of two distinct categories, which they coined "general jurisdiction" and "specific jurisdiction."[19] Their theory immediately caught the attention of the legal community as an analytically appealing means of providing a framework for an otherwise untethered minimum contacts doctrine. Applications of the theory snaked their way through the appellate process until ultimately culminating with the Supreme Court's endorsement in 1984:

> [W]hen a State exercises personal jurisdiction over a defendant in a suit arising out of or relating to the defendant's contacts with the forum, the State is exercising "specific jurisdiction" over the defendant.
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> . . . .
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> When a State exercises personal jurisdiction over a defendant in a suit

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Jurisdiction, or Specific Jurisdiction, But Is It Constitutional?, 48 CASE W. RES. L. REV. 559, 564 (1998).

16. *Int'l Shoe*, 326 U.S. at 316.

17. *Id.* at 316-17.

18. *Id.* Since the *International Shoe* case, the Court has stated that the defendant's minimum contacts must be considered in light of other factors to determine whether the exercise of jurisdiction fits within the overall notion of "fair play and substantial justice." Relevant factors for determining the reasonableness of jurisdiction include "the burden on the defendant," "the forum State's interest in adjudicating the dispute," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and the "shared interest of the several States in furthering fundamental substantive social policies." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985). In *Burger King*, the Court explained that

> [t]hese considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. On the other hand, where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.

Id.

19. Arthur T. Von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144-64 (1966).

> not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising "general jurisdiction" over the defendant.[21]

Today, the terms specific jurisdiction and general jurisdiction are as ubiquitous as the phrase minimum contacts.

Notwithstanding the universal acceptance of the concepts of general and specific jurisdiction, the ensuing four decades have proven that the distinction between specific and general jurisdiction is anything but neat. Like the elusiveness of the horizon, as one approaches the point that distinguishes specific jurisdiction from general jurisdiction it becomes apparent that no clear demarcation exists.

In 1988, two leading scholars attempted to define the distinguishing characteristics of general and specific jurisdiction.[22] Their articles debated the appropriate scope of general and specific jurisdiction and, although they did not agree, each author offered a thorough analysis of the issue and thoughtful suggestions for how the Supreme Court might proceed in developing a coherent doctrine of personal jurisdiction. Now, after turning the page on a new century, the legal community is no closer to resolving this conundrum than we were in 1988.[23] Many legal scholars thought that the Court would finally address the issue when it accepted certiorari in *Carnival Cruise Lines v. Shute*, only to be disappointed when the Court dodged the minimum contacts issue by enforcing a flimsy forum selection clause hidden in the small print of a form contract.[24] One can only hope that the Supreme Court has not issued its final word on the subject and that it is merely waiting for the appropriate case to answer some of the nagging questions that exist regarding the personal jurisdiction doctrine.

II. THE PROBLEM: DEFINING THE SCOPE OF SPECIFIC JURISDICTION

The distinction between general and specific jurisdiction rests upon the idea that unlimited contacts will give rise to unlimited jurisdiction and limited contacts will give rise to limited jurisdiction.[25] In order to maintain the integrity of the distinction between general and specific jurisdiction, one must consider

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21. Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 nn.8-9 (1984).

22. Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444 (1988) [hereinafter Brilmayer, *Related Contacts*]; Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988).

23. Several other articles have been written on the relatedness requirement of specific jurisdiction but the legal community has reached no consensus on the appropriate standard. *See, e.g.*, Flavio Rose, Comment, *Related Contacts and Personal Jurisdiction: The "But For" Test*, 82 CAL. L. REV. 1545 (1994); Mark Maloney, Note, *Specific Personal Jurisdiction and the "Arise From or Relate to" Requirement*, 50 WASH. & LEE L. REV. 1265 (1993).

24. Carnival Cruise Lines v. Shute, 499 U.S. 585, 595 (1991).

25. The Supreme Court has not defined clearly the characteristics of general jurisdiction and therefore the author uses the phrase "unlimited contacts" to loosely refer to the substantiality requirement that must be satisfied for general jurisdiction.

two factors: (1) how "unlimited" or substantial must a defendant's forum contacts be to justify general jurisdiction[26] and (2) how "limited" is the scope of specific jurisdiction that arises out of a defendant's purposeful, but limited, contacts with a forum? These questions are easily blurred together in factual scenarios where a defendant has a significant (but not overwhelming) amount of contact with a forum and is hailed into the forum for a cause of action that is only marginally related to the forum contacts. A sampling of federal circuit court opinions reveals that in such circumstances there is significant disagreement on the requirements for general and specific jurisdiction.[27] This Article seeks to respond to this problem by more clearly defining the scope of specific jurisdiction, thereby resisting the temptation to dilute the requirements of general jurisdiction.

III. A CRITIQUE OF THE EXISTING THEORIES OF RELATEDNESS

Since the Supreme Court adopted the minimum contacts doctrine over fifty years ago, the Court has never fully elaborated on the standard that should be applied to determine the scope of specific jurisdiction. Rather, the Court has loosely stated that a cause of action must "arise out of," "relate to" or be "connected with" the defendant's forum contacts.[28] Notwithstanding the Court's lack of direction—or possibly because of it—lower courts and commentators have struggled to give meaning to the nexus requirement. Following is a discussion of the leading theories on what the nexus requirement entails. In an effort to compare and contrast the theories, each of the theories will be applied to the following hypotheticals:

- Car Accident Hypothetical: Driver, a citizen of New York, commutes to and from his office in Connecticut every work day. Additionally, he regularly travels through Connecticut, Massachusetts, and New Hampshire to reach his summer home in Maine. On one such occasion, while driving through Massachusetts, he hits Pedestrian, a citizen of Connecticut. Where is Driver subject to specific personal jurisdiction for this accident?[29]

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26. While the Supreme Court has not expressly defined the quantum of contacts that is necessary for general jurisdiction, a number of scholars have asserted forcefully that general jurisdiction should be interpreted narrowly. *See* Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 80-81 (discussing the limited number of situations that should give rise to general jurisdiction) [hereinafter Brilmayer, *How Contacts Count*]; Twitchell, *supra* note 22, at 633; von Mehren & Trautman, *supra* note 19, at 1137 (citations omitted) (general jurisdiction has been grounded in "three types of relationship between the defendant and the forum: his domicile or habitual residence; his presence; and his consent").

27. See *supra* note 9 for a sampling of circuit court opinions on specific and general jurisdiction.

28. Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

29. The author has adopted this hypothetical from a similar one used by Professor Brilmayer to illustrate her theory of substantive relevance. *See* Brilmayer, *Related Contacts*, *supra* note 22,

- Product Liability Hypothetical: New York Company distributes its widgets in every state in the country. It sends a defective product into Pennsylvania where Consumer, a citizen of Ohio, purchases the product. Consumer takes the product to his home in Ohio where he suffers serious injuries caused by the defect. Where is Company subject to specific personal jurisdiction for this injury?[30]
- Hotel Drowning Hypothetical: Hotel located in Hong Kong sends direct mail solicitation to the 500 largest companies in the United States offering a discounted rate for corporate employees traveling to Hong Kong for business. Massachusetts Company responds to the discount offer and enters into an agreement to receive a discount based upon a minimum number of overnight stays at Hotel per year. Employee of Company thereafter contacts Hotel from Massachusetts and makes reservations to stay at Hotel for a business trip. While staying at Hotel, Employee drowns in Hotel pool. Assuming that Hotel has similar arrangements with U.S. companies in other states as well as Massachusetts, where is Hotel subject to specific personal jurisdiction for this accident?[31]

A. The Substantive Relevance Test and the Proximate Cause Test

One of the leading theories on the relatedness requirement suggests that a defendant's purposeful forum contact will give rise to specific jurisdiction over a controversy if the contact is substantively relevant to the resolution of the controversy. This test, frequently referred to as the substantive relevance test, defines the scope of jurisdictional authority according to the legal framework that is at issue, granting specific jurisdiction only if the defendant's forum contact provides evidence of one or more elements of the underlying claim. Professor Lea Brilmayer, a leading proponent of this theory, offers the following description:

> A contact is related to the controversy if it is the geographical qualification of a fact relevant to the merits. A forum occurrence which would ordinarily be alleged as part of a comparable domestic complaint is a related contact. In contrast, an occurrence in the forum State of no relevance to a totally domestic cause of action is an unrelated contact, a purely jurisdictional allegation with no substantive purpose.[32]

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at 1445.

30. The author has adopted this hypothetical from the facts of *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) and *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).

31. This hypothetical is loosely based upon the facts of *Nowak v. Tak How Investments, Ltd.*, 94 F.3d 708 (1st Cir. 1996).

32. Brilmayer, *How Contacts Count*, *supra* note 26, at 82 (citation omitted); *see also* Brilmayer, *Related Contacts*, *supra* note 22, at 1452 (coining the phrase "substantive relevance"). Professor Brilmayer describes her substantive relevance test in two forms: a weaker version and a stronger version. The weaker version asks whether one who is "telling the story" of the event giving

In essence, this test uses the applicable substantive law as the defining criteria for relatedness.[33]

The substantive relevance test encompasses another frequently cited test which confers specific jurisdiction when a defendant's forum contact is a proximate cause of the plaintiff's cause of action. Proximate cause is comprised of two considerations: (1) was the defendant's action a cause in fact of the plaintiff's injury and (2) if the defendant's action was a cause in fact of the injury, does the law impose legal responsibility on the defendant for the injury?[34] Although the concept of proximate cause is generally associated with tort actions, a similar legal question is posed in every civil claim because civil liability requires a determination that the defendant's conduct caused an injury to the plaintiff for which a legal right of recovery exists.[35] As such, the substantive relevance test encompasses what some courts have referred to as the proximate cause test because both tests consider whether the defendant's purposeful contacts justify the imposition of legal responsibility on the defendant for the plaintiff's injury.[36]

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rise to the litigation would necessarily describe the forum contact—in other words are the contacts with the forum central to the plot of the legal assertions being made? Brilmayer, *Related Contacts*, *supra* note 22, at 1453. The stronger version of substantive relevance defines the relevant contacts as those that are linked to the applicable substantive law such that the forum conduct makes "a difference in the dispute's legal treatment." *Id.* at 1455-56.

33. Professor Brilmayer loosens the standard slightly by suggesting that "one need not make a full-fledged choice of law determination: one need merely consider the laws reasonably vying for application." Brilmayer, *Related Contacts*, *supra* note 22, at 1456.

34. PROSSER AND KEETON ON TORTS § 42 (5th ed. 1984). Determining whether a defendant should bear legal responsibility for a given action requires an evaluative conclusion that is not "factual" in the ordinary sense that one might determine who, what, where or when an event occurred. *Id.*

35. Although the substantive relevance test is theoretically broader than the proximate cause test, in practice the two tests are nearly equal. For example, in a negligence case the substantive relevance test could theoretically be satisfied if the defendant's forum conduct forms evidence of duty, breach, causation, or injury (whereas the proximate cause test would only be satisfied if the defendant's forum conduct forms evidence of causation). But, in any given case, evidence of duty or breach is only relevant to the case if it is causally linked to the plaintiff's injury. Thus, if the defendant's conduct gave rise to a duty which it breached in the forum, jurisdiction would arise only if the breach *caused* the plaintiff's injury (if the breach was unrelated to the plaintiff's injury it would be substantively irrelevant). Similarly, evidence that the plaintiff suffered the injury in the forum would not alone justify specific jurisdiction because jurisdiction must rest upon the defendant's purposeful conduct toward the forum, not the place where the plaintiff ultimately suffered the effects of the defendant's conduct. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

36. *See, e.g.*, *Nowak*, 94 F.3d at 715 ("Adherence to a proximate cause standard is likely to enable defendants better to anticipate which conduct might subject them to a state's jurisdiction than a more tenuous link in the chain of causation. Certainly, jurisdiction that is premised on a

1. Car Accident Hypothetical.—Applying the substantive relevance test to the car accident, Driver (defendant) would be subject to specific personal jurisdiction in Massachusetts because his purposeful contact with Massachusetts is central to Pedestrian's legal claim. Driver created a purposeful contact with Massachusetts by driving on the roads in the state and the facts surrounding the Massachusetts accident will make a difference to the outcome of the case because they provide evidence that his negligence was the proximate cause of Pedestrian's injury. Thus, Driver has substantively relevant contacts with Massachusetts that would justify allowing a court in Massachusetts to exercise personal jurisdiction for the accident. But are there other jurisdictions that might give rise to specific jurisdiction?

Pedestrian could argue that Connecticut is an appropriate jurisdiction because Driver regularly benefits from using Connecticut roads and highways to commute to and from his office, to his summer home in Maine and, more specifically, Driver used the Connecticut highway to reach Massachusetts immediately prior to hitting Pedestrian. First, it would seem that although Driver regularly uses the Connecticut roads and highways to commute to his office and summer home, these contacts have nothing to do with the Massachusetts accident and therefore are not substantively relevant to this cause of action. The only contact that is arguably relevant to Pedestrian's injury would be the fact that Driver passed through Connecticut on his way to Massachusetts on the occasion that gave rise to the accident with Pedestrian. This fact, however, would not ring the bell under a substantive relevance test because it does not provide evidence of one of the elements of Pedestrian's legal claim: duty, breach, causation, or injury. Thus, Driver's contacts with Connecticut would not justify specific jurisdiction over Pedestrian's claim under the substantive relevance test.

Pedestrian could also argue that New Hampshire or Maine are appropriate jurisdictions to hear the claim because Driver regularly traveled through New Hampshire to reach his home in Maine and intended to reach both forums on this trip.[37] The substantive relevance test would reject jurisdiction in these forums, however, for reasons similar to those that caused us to reject jurisdiction in Connecticut. Any prior trips through New Hampshire to reach Maine are not relevant to Pedestrian's claim and Driver's intent to drive through New Hampshire to reach Maine has no bearing on the outcome of the case because it does not provide evidence of an element of Pedestrian's negligence claim. Thus, Driver's contacts with New Hampshire and Maine are not substantively relevant to Pedestrian's claim.

2. Product Liability Hypothetical.—Applying the substantive relevance test to the product distribution case, the New York Company (defendant) would be

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contact that is a legal cause of the injury underlying the controversy–i.e., that forms an 'important, or [at least] material, element of proof; in the plaintiff's case'—is presumably reasonable, assuming, of course, purposeful availment.") (citation omitted).

37. *See* Cornelison v. Chaney, 545 P.2d 264, 267-68 (Cal. 1976) (upholding jurisdiction over a truck driver who was involved in an accident in Nevada because the truck driver regularly delivered goods in California and was bound for California at the time of the accident in Nevada).

subject to specific jurisdiction in Pennsylvania because its purposeful contacts with Pennsylvania are central to Consumer's (plaintiff) argument that Company should bear legal responsibility for Consumer's injury. Company knowingly sent its products into Pennsylvania to be sold to consumers and the evidence of duty, breach, and causation will focus on Consumer's purchase of the allegedly defective product. Under these circumstances the substantive relevance test would be satisfied.

Among the other states where Company distributes its products, Ohio seems to present the strongest connection to Consumer's claim. Company, however, would not be subject to jurisdiction in Ohio under the substantive relevance test. Although Company purposefully availed itself of the benefit of doing business in Ohio by regularly shipping its products into Ohio, and although one of its products caused Consumer's injury in Ohio, the particular product that caused Consumer's injury was not one that was sent by Company into Ohio. Without a causal link between Company's actions in Ohio and Consumer's injury, Company's Ohio contacts are irrelevant to the outcome of the dispute and thus not sufficient for specific jurisdiction under the substantive relevance test.[38]

3. Hotel Drowning Hypothetical.—Under the substantive relevance test, Employer, or, more accurately, the Employee's family (plaintiff) may be able to argue that Hotel's contacts with Massachusetts are sufficient to subject it to specific jurisdiction in Massachusetts for a breach of contract claim. In proving breach of contract, the plaintiff would have to establish: (1) a contract; (2) the terms of the contract (specifically that Hotel promised to provide safe accommodations to Employee); and (3) a breach (a failure to provide safe accommodations which precipitated the accident in the pool).[39] In proving the existence and terms of the contract, Employee's family would attempt to show that Hotel reached into Massachusetts to solicit business, it negotiated discount arrangements with various Massachusetts corporations, and pursuant to one such discount arrangement, Employee contacted Hotel from Massachusetts and made a reservation to visit Hotel. Even if the safety of the accommodations was never expressly discussed, Employee's family could argue that the terms of the contract implicitly included a promise of safe accommodations. Thus, if the court is willing to consider the facts surrounding the creation of the contract, Employee's family would be able to argue that Hotel's solicitation efforts provide evidence

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38. It is interesting to note that although Consumer's case will focus on evidence showing that Company's product caused injury to Consumer in Ohio, an Ohio injury is not sufficient to satisfy the substantive relevance test for specific jurisdiction in Ohio. The minimum contacts doctrine requires that jurisdiction be based upon the defendant's purposeful contacts with the forum, not on plaintiff's contacts with the forum. Thus, although one of Company's products caused Consumer's injury in Ohio, Company did not send the offending product to Ohio; it sent the product to Pennsylvania and Consumer transported it to Ohio where she suffered the injury.

39. *See* Milner Hotels v. Norfolk & W. Ry., 822 F. Supp. 341, 344 (S.D. W. Va. 1993), *aff'd*, 19 F.3d 1429 (4th Cir. 1994) (unpublished table decision) (discussing breach of contract agreeing to provide safe and clean hotel accommodations).

of some elements of their claim.[40]

Hotel would not be subject to specific jurisdiction in Massachusetts for a tort claim asserting that it was negligent in failing to provide safe accommodations. Under a negligence claim, Hotel's Massachusetts contacts would have to be relevant to proof of duty, breach, causation, or injury. These elements would be proven by the facts surrounding the drowning in Hong Kong. The fact that Hotel reached into Massachusetts and solicited Massachusetts corporations to send their employees to stay at Hotel is irrelevant to the evidence of negligence at the facility. Thus, under a strict application of substantive relevance, Hotel may be subject to specific personal jurisdiction for breach of contract but would not be subject to jurisdiction for negligence, even though both claims arise out of the same injury.[41]

4. Pros and Cons of Substantive Relevance.—By linking the jurisdictional question with the substantive legal questions to be resolved in a suit, the substantive relevance test provides analytical clarity, predictability, and efficiency. The test minimizes the recurrent criticisms of the minimum contacts doctrine by providing a framework for plaintiffs to make informed decisions about where to file suit while, at the same time, providing notice to defendants of the likely jurisdictional exposure that they will face as a result of their forum conduct. Systemic efficiency is enhanced to the extent that plaintiffs are less likely to file suit in improper jurisdictions, defendants are more likely to waive their objections to personal jurisdiction where analysis clearly shows the objection to be futile and courts are able to make jurisdictional determinations consistently and expeditiously.

Notwithstanding these benefits, the substantive relevance test imposes stricter limits on the reach of specific jurisdiction than the Supreme Court has endorsed to date. In *International Shoe Co. v. Washington*, the Court described the relationship between a defendant's forum activities and its jurisdictional exposure as a type of quid pro quo:

> to the extent that a [defendant] exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or *are connected with* the activities within the state, a procedure which requires the [defendant] to respond to a suit brought to enforce them can, in most instances, hardly

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40. Under these circumstances, the facts surrounding the solicitation are tangentially relevant to an element of a claim and thus allow one to argue substantive relevance. However, if substantive relevance requires that the evidence be material to the outcome of the dispute, the evidence of solicitation will not be sufficient to confer specific jurisdiction.

41. One could argue that the doctrine of pendent personal jurisdiction would provide a basis for exercising jurisdiction over the tort claim because it arises out of the same nucleus of operative fact as the contract claim. *See* Linda Sandstrom Simard, *Exploring the Limits of Specific Personal Jurisdiction*, 62 OHIO ST. L.J.1619, 1630-32 (2001) (explaining the doctrine of pendent personal jurisdiction in relation to traditional minimum contacts cases).

be said to be undue.[42]

If the Court intended to require that a defendant's contacts form the legal cause of the plaintiff's claim, it should not have referred to a mere "connection" between the claim and the defendant's activities within the state. As written, the Court's decision implies that even when a defendant's contacts do not give rise to the plaintiff's claim, the plaintiff's claim still may be sufficiently "connected with the [defendant's] activities in the state" to justify specific jurisdiction.[43]

The hotel drowning hypothetical illustrates the underinclusive nature of the substantive relevance test. The substantive relevance test likely would exclude from consideration Hotel's purposeful solicitation of business in Massachusetts because it is not evidence of an element of Employee's family's claim for relief. Yet, solicitation of business in a forum arguably falls within the Court's notion of a quid pro quo—if a defendant reaches out to citizens of a forum and entices them into a business transaction, the defendant should be required to answer for claims arising out of the transaction in the forum where it solicited the sale. Recognizing that strict adherence to a substantive relevance/proximate cause standard may be unnecessarily restrictive in some instances, the Court of Appeals for the First Circuit has held that a defendant's solicitation of a Massachusetts business provided "a meaningful link" between the defendant and the harm suffered outside the forum.[44] Characterizing its holding as a "slight loosening of [the proximate cause] standard," the court stated:

> When a foreign corporation directly targets residents in an ongoing effort to further a business relationship, and achieves its purpose, it may not necessarily be unreasonable to subject that corporation to forum jurisdiction when the efforts lead to a tortious result. The corporation's own conduct increases the likelihood that a specific resident will respond favorably. If the resident is harmed while engaged in activities integral to the relationship the corporation sought to establish, we think the nexus between the contacts and the cause of action is sufficiently strong to survive the due process inquiry at least at the relatedness stage.[45]

Thus, strict adherence to the substantive relevance test would preclude the exercise of jurisdiction in situations that would otherwise appear to satisfy the policy concerns of the doctrine.[46]

An additional criticism of the substantive relevance test is that while the test provides clarity and predictability because it is dependant upon the elements of the plaintiff's claim, it places unnecessary emphasis on the content of substantive

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42. Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) (emphasis added).

43. *Id.*

44. Nowak v. Tak How Invs., Ltd., 94 F.3d 708, 716 (1st Cir. 1996).

45. *Id.* at 915-16.

46. While the *Nowak* court limited its holding to the particular facts of that case, the court noted that other fact patterns could be found to meet the basic criteria of forseeability and thus provide a basis for further loosening of the proximate cause standard. *Id.* at 716.

law and on pleading requirements. Justice Brennan expressed this criticism of the substantive relevance test in his dissenting opinion in *Helicopteros Nacionales de Colombia v. Hall*, noting that, "[l]imiting the specific jurisdiction of a forum to cases in which the cause of action formally arose out of the defendant's contacts with the State would subject constitutional standards under the Due Process Clause to the vagaries of the substantive law or pleading requirements of each State."[47] A strict application of substantive relevance will sometimes lead to the conclusion that a defendant is subject to specific jurisdiction for some claims arising out of a given factual scenario but not other claims arising out of the same scenario. The drowning hypothetical illustrates this problem because specific jurisdiction arguably exists over the breach of contract claim but not over a tort claim, despite both claims arising out of the same accident. The Court of Appeals for the Fifth Circuit rejected a strict substantive relevance test in *Prejean v. Sonatrach, Inc.* in favor of a looser "but for" test, noting that "[l]ogically, there is no reason why a tort cannot grow out of a contractual contact. In a case like this, a contractual contact is a 'but for' causative factor for the tort since it brought the parties within tortious 'striking distance' of each other."[48]

Finally, the substantive relevance test contradicts the notion of flexibility inherent in the minimum contacts philosophy of "fair play and substantial justice." Substantive relevance provides clarity and predictability but also excludes from consideration contacts that may be relevant to the overall fairness of asserting jurisdiction. For example, a strict application of substantive relevance would not consider the totality of circumstances surrounding a defendant's relationship with a forum but rather would focus on only those contacts that will have an impact on the outcome of the case.[49] Considering the product liability hypothetical, Company will be shielded from jurisdiction in Ohio by a strict application of substantive relevance even though: (1) it regularly sends its product into Ohio and benefits from sales to Ohio citizens; (2) the product at issue in the particular case allegedly malfunctioned in Ohio; and (3)

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47. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 427 (1984) (Brennan, J., dissenting) ("For example, the complaint filed against Helicol in this case alleged negligence based on pilot error. Even though the pilot was trained in Texas, the Court assumes that the Texas courts may not assert jurisdiction over the suit because the cause of action 'did not "arise out of," and [is] not related to,' that training. If, however, the applicable substantive law required that negligent training of the pilot was a necessary element of a cause of action for pilot error, or if the respondents had simply added an allegation of negligence in the training provided for the Helicol pilot, then presumably the court would concede that the specific jurisdiction of the Texas courts was applicable.") (alterations in original) (internal citation omitted).

48. Prejean v. Sonatrach, Inc., 652 F.2d 1260, 1270 n.21 (5th Cir. Unit A Aug. 1981).

49. *See* William M. Richman, Review Essay, 72 CAL. L. REV. 1328, 1340 (1984) (reviewing ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS (1983) (critiquing the substantive relevance test); *see also* Mary Twitchell, *A Rejoinder to Professor Brilmayer*, 101 HARV. L. REV. 1465, 1469 (1988) (explaining that the cost of substantive relevance test is flexibility, fairness to plaintiff, and state power).

Consumer suffered injury in Ohio. Although the specific goods that Company sent to Ohio are admittedly irrelevant to Consumer's evidence of negligence, these contacts are relevant to the defendant's expectation of suit in the forum. Rejecting jurisdiction under these circumstances would allow form to trump substance: a defendant, who otherwise would be subject to jurisdiction in Ohio for an injury caused by its allegedly defective product sold in Ohio, would be able to shield itself from jurisdiction in Ohio because this plaintiff happened to purchase this particular product in another state.[50] Company's contacts with Ohio should not be excluded from consideration merely because they are not the proximate cause of Consumer's injury, particularly in light of the continuous and substantial nature of those contacts.

B. The "But For" Causation Test

This classic test for determining cause-in-fact requires one to compare the actual facts of a dispute as they occurred with what might have occurred, hypothetically, if the defendant had acted differently or not at all.[51] If the plaintiff's injury would not have occurred in the absence of the defendant's forum contact, the defendant's forum contact will be considered a "but for" cause of the claim and thus specific jurisdiction would exist under this test.[52] The "but for" test is much broader than the proximate cause test because it allows a court to consider any necessary antecedent to the plaintiff's injury, not just those actions by the defendant for which the law imposes responsibility. The "but for" test looks beyond the immediate cause of the plaintiff's claim and considers the "cause of the cause."[53] The Ninth Circuit, which has expressly adopted the "but for" test, considers "whether the 'entire course of events . . . was an uninterrupted whole which began with, and was uniquely made possible by, the [defendant's forum] contacts."[54]

To the extent that the "but for" test allows one to consider the "cause of the cause," the test may have an extraordinarily broad reach. For example, if a lawyer is sued on a legal malpractice claim, should he be subject to specific jurisdiction in the forum where he went to law school on the theory that his law degree is a "but for" cause of the suit?[55] What about the jurisdiction where he

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50. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980) (dicta) (implying that Audi and Volkswagen of America would be held subject to specific personal jurisdiction in Oklahoma based upon facts similar to those presented in the product liability hypothetical).

51. PROSSER & KEETON ON TORTS, *supra* note 34, § 41.

52. Alexander v. Circus Circus Enters., Inc., 939 F.2d 847, 853 (9th Cir. 1991), *rev'd*, 972 F.2d 261 (9th Cir. 1992) (reversing on other grounds).

53. Maloney, *supra* note 22, at 1280.

54. *Alexander*, 939 F.2d at 853 (quoting Shute v. Carnival Cruise Lines, 897 F.2d 377, 384 (9th Cir. 1990)).

55. Rose, *supra* note 23, at 1572 (making a distinction between historical and "but for" cause).

was born because he could not have become a lawyer but for being born? While most would agree that these jurisdictions are too remotely related to the malpractice claim to form a basis for specific jurisdiction, a basic "but for" analysis seems to suggest that these forums would be acceptable. To avoid this overly broad interpretation of the test, one must consider that one uses this test to determine whether a forum is sufficiently connected to a claim to justify its involvement in adjudicating the claim. If one considers a fact to be a "but for" cause of the claim, then one must consider whether the location of the fact helped give rise to the claim or whether the fact could have occurred elsewhere and still given rise to the claim. If changing the location of the fact would not affect the occurrence of the dispute, then the fact is merely a historical cause of the dispute and not a true "but for" cause.

The distinction between historical cause and "but for" cause may be illustrated by the above malpractice example. In that case, the place where the defendant went to law school is a historical cause of the claim, but not a "but for" cause because, if the defendant had not attended law school in one location, he likely would have attended law school elsewhere.[56] If the defendant had attended law school in another jurisdiction, he still would have been in the position to provide legal advice to the plaintiff and thus still would have been sued. Similarly, if the defendant had not been born in one location, one must assume that he would have been born elsewhere (and he would have attended law school and provided legal services to the plaintiff). Thus, although the defendant's birth and his law degree "caused" the malpractice claim, the location of these events is not a "but for" cause of the claim, rather, it is merely an historical cause.[57]

1. Car Accident Hypothetical.—Applying the "but for" test to the hypothetical car accident case, Driver would be subject to specific personal jurisdiction in Massachusetts because Pedestrian's injury would not have occurred "but for" Driver's purposeful contact with Massachusetts on his way to Maine.[58] Driver availed himself of the privilege of using Massachusetts

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56. *Id.*

57. There are other situations where the "but for" doctrine may prove difficult to apply. For example, where a defendant engages in similar conduct in multiple locations and the conduct gives rise to similar injuries to the plaintiff in each of these locations, it may be difficult to say that the defendant's conduct in one of those jurisdictions is the "but for" cause of the entire injury to the plaintiff. Similarly, when a plaintiff suffers injury that results from the cumulative effects of several different actions, it may be difficult to determine which action, if any, is the "but for" cause of the injury. *See id.* at 1570-71.

58. Massachusetts is a true "but for" cause of the accident because if one assumes that Driver drove through upstate New York instead of entering Massachusetts, Driver and Pedestrian would not have had an opportunity to come into "contact" with one another and thus, this accident would not have occurred. One could compare this analysis with one concerning the location where Driver purchased the car that he was driving at the time of the accident. If one assumes that Driver purchased the car in Connecticut, one must consider whether Connecticut is a historical cause of the accident or a "but for" cause of the accident. Under these facts, Connecticut would not be a "but for" cause of the accident because Driver could have purchased the car in another forum and

roadways and his alleged negligent conduct took place in Massachusetts. As this contact was a direct cause of Pedestrian's injury, the nexus requirement would be satisfied.

Pedestrian could argue that specific jurisdiction exists in Connecticut because Driver availed himself of the privilege of using Connecticut roadways and that this contact was a link in the chain of causation that led to Driver's presence in Massachusetts at the time of the accident. While Driver's passage through Connecticut may be a "cause of the cause" of the claim, none of Driver's alleged negligent conduct took place in Connecticut and Pedestrian was not injured in Connecticut.[59] If one accepts the distinction between historical cause and "but for" cause, Driver's contact with Connecticut would be considered a historical cause of the accident because Driver could have reached Massachusetts without ever entering Connecticut. Thus, while traveling through Massachusetts was a "but for" cause of the accident, traveling through Connecticut was merely a historical cause.[60] If, on the other hand, one rejects the distinction between historical cause and "but for" cause, Connecticut, as well as countless other potential jurisdictions, would have a basis to assert specific jurisdiction.[61]

2. *Product Liability Hypothetical.*—Applying the "but for" test to this hypothetical, Company would be subject to specific jurisdiction in Pennsylvania because it purposefully availed itself of the privilege of conducting business in Pennsylvania and Consumer (plaintiff) would not have purchased the product that caused his injury if Company had not sent it into the forum. Indeed, Company's Pennsylvania contacts are not an attenuated cause of the cause of the accident; they are a proximate cause of the accident.

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still have been involved in the accident in Massachusetts. The fact that Driver purchased the car in Connecticut would not be sufficient to justify specific jurisdiction under the "but for" test.

59. To the extent that the test looks exclusively at events in the chain of causation, it opens the door to many other possible jurisdictional locations. For example, if Driver had been traveling from Florida to Maine, instead of from New York to Maine, Driver's contacts with each of the states that he passed through prior to reaching Massachusetts might be a "but for" cause of the accident and a possible forum for litigating the dispute surrounding the Massachusetts accident.

60. This distinction between historical cause and "but for" cause would present an interesting situation if Driver's route to Maine *required* him to travel through certain states, but allowed some choice on whether to travel through other states. Presumably, the states that he had to travel through would be deemed "but for" causes of the accident, but states where he could have avoided entry by traveling elsewhere would be only historical causes of the accident.

61. Driver's other contacts with New Hampshire (his regular use of New Hampshire highways to reach his summer home and his intention to use the New Hampshire highway on this occasion) would be insufficient to justify jurisdiction under the "but for" test because Driver's previous use of New Hampshire highways is not a link in the causal chain relating to this accident. Further, Driver's mere intention to use the New Hampshire highways on this occasion would be too speculative to count as a purposeful contact under the minimum contacts doctrine. Even if Driver continued his trip to Maine after hitting Pedestrian and traveled through New Hampshire, subsequent forum contacts cannot be a factor in the "but for" analysis because the injury had already occurred by the time Driver reached New Hampshire and Maine.

Would the "but for" test justify the assertion of jurisdiction in other forums where Company distributes its products? There is little question that Company purposefully avails itself of the privilege of conducting business in every state in the country for the benefit of reaping financial reward from sales in each forum, and the exercise of this privilege creates a level of jurisdictional exposure in each forum. Under the "but for" test, however, specific jurisdiction over Consumer's claim would not extend to any of these forums because Company's contacts in states other than Pennsylvania are not links in the chain of causation that led to this Consumer's injury. Company would not even be subject to specific jurisdiction in Ohio because the accident did not result from one of the products that Company sent to Ohio. As there is no link in the causal chain, Company's purposeful contacts with Ohio are irrelevant under a "but for" test.[62]

3. Hotel Drowning Hypothetical.—Applying the "but for" test to this hypothetical, Hotel (defendant) would be subject to specific jurisdiction in Massachusetts for either a contract or tort action because Hotel reached into Massachusetts to solicit business from the Massachusetts Company, and because this solicitation caused Employee (plaintiff) to contact the hotel for a reservation, ultimately placing Employee at the pool where she drowned.[63] There is no question that the solicitation was a link in the causal chain that led to the drowning, but is it a true "but for" cause? If Hotel had not solicited sales from companies located in Massachusetts, Employee would have been less likely to choose Hotel for her stay in Hong Kong. Thus, one could argue that since the chain of events could have been altered if Hotel had not reached out to solicit business in Massachusetts, Hotel's Massachusetts contacts are a "but for" cause of the accident and Hotel would be subject to jurisdiction in Massachusetts pursuant to the "but for" test.[64]

4. Pros and Cons of the "But For" Test.—By allowing courts to consider the "cause of the cause" of a claim, the "but for" test generously opens the jurisdictional analysis to any fact that forms a link in the causal chain leading to the claim, thus expanding the reach of specific jurisdiction and limiting the problem of underinclusiveness. The substantive relevance test and the "but for" test both reject specific jurisdiction in the absence of any causal link between the defendant's forum contacts and the plaintiff's claim, thus producing similar

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62. One might argue that specific jurisdiction would be appropriate in the forum(s) where the defective widget was made or where component parts for the defective widget were made because Consumer's injury would not have occurred "but for" these events.

63. Application of the "but for" test depends upon a causal link between Hotel's solicitation of business and Employee's decision to stay at Hotel. If Hotel had merely advertised its facility in a newspaper that circulated in Massachusetts, the jurisdictional significance of the contact might be debatable. For example, in order to establish the causal link between the advertisement and the accident, Employee would have to show that she saw the advertisement and that it impacted her decision to visit the hotel.

64. Although Hotel also solicited and entered into discount arrangements with companies in other states, these contacts would not give rise to specific jurisdiction for the drowning accident because they are not links in the chain of causation for this accident.

results with regard to jurisdictions which have no causal connection to the claim. The divergence in the two tests lies in the perimeter of the analysis. While the substantive relevance test strictly limits the analysis to the facts that provide evidence of the elements of the substantive law, the "but for" test focuses on the factual events that give rise to the legal dispute, thereby extending the inquiry to consider the details that generated the situation culminating with the claim.

The hotel drowning hypothetical aptly illustrates this advantage of the "but for" test over the substantive relevance test. Under the substantive relevance test, Hotel's purposeful solicitation of business in Massachusetts would be ignored in the jurisdictional analysis because it is not evidence of duty, breach, causation, or injury. Under the "but for" test, on the other hand, the jurisdictional analysis would include the fact that Hotel purposefully reached into Massachusetts to initiate a financially rewarding relationship with Employee's Massachusetts employer, without which Employee might never have visited Hotel. Regardless of whether the dispute is characterized as a breach of contract or a tort, regardless of the particular pleading requirements that might be applicable, and regardless of the elements of the applicable law, the "but for" test would allow the court to exercise jurisdiction over the defendant based upon its conduct in reaching into the state.

Notwithstanding the flexibility that is offered by focusing on the factual event rather than the elements of the applicable law, the "but for" test may be criticized for failing to provide a clear rule to determine when a "contributing" factor is too remote to be jurisdictionally significant, thus creating a concomitant overinclusiveness problem. While it is possible to limit the broad reach of the "but for" test by excluding from consideration factors that are merely historical causes of the claim, distinguishing between these two categories of causation is largely based upon speculation. The car accident hypothetical illustrates some of the difficulty that exists in differentiating historical cause and "but for" cause. Although it was clear that Driver's contact with Massachusetts was a "but for" cause of the accident, the defendant's contacts with other forums raised difficult questions. For example, Driver chose to drive through Connecticut even though he could have taken a different route that would have avoided passage through Connecticut. Should the court assume that Driver's contact with Connecticut was merely a historical cause of the accident because he could have hypothetically reached the location of the accident without entering Connecticut, or should the court consider the factors that led to Driver's decision to travel through Connecticut? (What if it was possible for the defendant to take a route that avoided Connecticut, but this route was much longer and thus not a probable route for Driver to choose—would Connecticut now become a "but for" cause of the accident?)[65]

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65. What if Driver had recently had his brakes repaired in Vermont? If the brakes were a contributing factor in the Massachusetts accident, would a court determine that Driver's decision to have his brakes repaired in Vermont is a "but for" cause of the accident or merely a "historical cause"? He certainly could have had his brakes fixed elsewhere but one would not know if the accident still would have occurred. These questions illustrate the tremendous difficulty that arises

Finally, although the "but for" test is broader and more flexible than the substantive relevance test, to the extent that both tests invoke the notion of causation, they arguably impose stricter limits on the reach of specific jurisdiction than the Supreme Court has imposed to date. The notion of "fair play and substantial justice," which is inherent in the minimum contacts doctrine, does not necessarily exclude the possibility of exercising jurisdiction in a forum where the defendant has contacts that are "connected" to the claim but are not a contributing factor to the claim.[66] The product liability hypothetical illustrates this limitation. Company would not be subject to personal jurisdiction in Ohio under the "but for" test, notwithstanding the fact that the Court has implied that the exercise of jurisdiction under similar circumstances could be constitutionally acceptable.[67]

C. Sliding Scale Test

Professor William M. Richman has advanced an appealing theory of personal jurisdiction which places specific and general jurisdiction on opposite poles of a sliding scale continuum and suggests an inverse relationship between the quantity of defendant's forum contacts and the relatedness of those contacts with the plaintiff's cause of action. Professor Richman suggests, "[a]s the quantity and quality of the defendant's forum contacts increase, a weaker connection between the plaintiff's claim and those contacts is permissible; as the quantity and quality of the defendant's forum contacts decrease, a stronger connection between the plaintiff's claim and those contacts is required."[68] Richman rejects the notion that jurisdiction can be cabined into two, or even three, discrete categories and he candidly states that the area in between specific and general jurisdiction includes "variations and gradations [that] are too numerous to catalogue."[69] He suggests that some of the factors that one might consider in determining the fairness of asserting jurisdiction in the gray area between general and specific jurisdiction should include: the benefit that the defendant has obtained from the forum, the foreseeability of some type of litigation in the forum, the lack of inconvenience to the defendant, and whether the defendant initiated the relationship with the forum.[70]

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when one must determine what likely would have happened if an earlier link in the chain of causation was altered.

66. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

67. *Id.* In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980), the Court implied that Audi and Volkswagen of America would be subject to jurisdiction in Oklahoma for a defective vehicle that they distributed in New York because Audi and Volkswagen served the Oklahoma market either directly or indirectly.

68. *See* Richman, *supra* note 49, at 1345.

69. *Id.* at 1340.

70. *Id.* at 1345. In *Davis v. Baylor University*, 976 S.W.2d 5, 9 (Mo. Ct. App. 1998) (internal citation omitted), the Court of Appeals of Missouri stated that it was applying

> a balancing test akin to the "sliding scale" approach . . . . [pursuant to which] there are

1. Car Accident Hypothetical.—Applying the sliding scale test to the car accident hypothetical, Driver would be subject to specific personal jurisdiction in Massachusetts because Driver's forum contact is very closely related to the cause of action. Driver initiated a relationship with the state of Massachusetts and benefitted from the use of the forum's roads. While using the roads, Driver caused the accident that is the subject of Pedestrian's lawsuit. Even if Driver's only contact with Massachusetts was on this single occasion, there is a very strong connection between Pedestrian's claim and Driver's purposeful contact with the forum, thus, the sliding scale test would be satisfied.

Pedestrian could argue that Connecticut is also an appropriate jurisdiction because Driver has numerous contacts with Connecticut: his office is located in Connecticut, (presumably he spends a significant amount of his time in the forum), he regularly uses Connecticut roads to commute to his office and to his summer home, and, more specifically, Driver used the Connecticut highway to reach Massachusetts immediately prior to hitting Pedestrian. Is this sufficient to justify an assertion of specific jurisdiction under the sliding scale test? On the one hand, Driver has more contacts with Connecticut than he has with Massachusetts; the contacts with Connecticut occur on a regular basis, and at least some of the contacts involve the same type of conduct (driving) that gave rise to the accident which is the subject of Pedestrian's suit. On the other hand, there is a weaker connection between Pedestrian's claim and Driver's Connecticut contacts—the only causal connection being that Driver passed through Connecticut on his way to Massachusetts immediately prior to the

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five factors to be considered: the nature and quality of the contacts with the forum state, the quantity of the contacts with the forum state, the relation of the cause of action to the contacts, the interest of the forum state in providing a forum for its residents, and the convenience to the parties. The first three factors are of primary importance, while the last two are of secondary importance.

In applying this test, however, the court failed to state how the quantity and quality of the defendant's contacts affected the required relationship between the cause of action and the contacts. The court held that Baylor University was subject to specific personal jurisdiction in Missouri based on its efforts to recruit the plaintiff, Tyrone Davis, to play basketball at the school in Texas. *Id.* at 14. The defendant's contacts with the forum included: written correspondence sent to the plaintiff in Missouri, telephone calls to the plaintiff in Missouri, and numerous visits to Missouri to meet with the plaintiff. *Id.* at 13. The court held that these contacts were sufficient to give rise to personal jurisdiction for breach of contract and fraudulent misrepresentation relating to statements "that the school ran an honest program" made while recruiting the plaintiff in Missouri, but not subject to jurisdiction for other claims alleging tortious interference with contractual relations, outrageous conduct, false light defamation, consumer protection violations, or conspiracy to the extent that these claims did not concern the alleged misrepresentation of "an honest program" which occurred in Missouri. *Id.* at 13-14. Notably, although the court stated that the university sent its agents to Missouri to recruit the plaintiff on a total of ten occasions and "from 1989 to 1996, Baylor representatives made thirty-two trips to Missouri for the purpose of recruiting basketball players," *id.* at 27, the court failed to explain how this quantity of contact affected the nexus requirement under the so-called "sliding scale" test.

accident (a contact that was deemed insufficient under the "but for" and substantive relevance tests).

One could argue that under the sliding scale test this would be sufficient to confer specific personal jurisdiction because the larger quantity of contacts with Connecticut compensates for the more attenuated connection between Pedestrian's claim and the forum contacts. But is this fair? Could Driver foresee being hailed into court in Connecticut for an automobile accident that occurred in Massachusetts? Although Driver initiated his regular and ongoing contact with Connecticut and benefitted from the relationship, the sliding scale test does not present clear guidelines to determine if a situation such as the one presented by this hypothetical satisfies the nexus requirement or not.[71]

The analysis would be complicated further if one were to consider filing the suit in Maine. Driver regularly uses Maine roads to get to his summer home and in fact owns a home in the forum. While the connection between Pedestrian's claim and Driver's Maine contacts is relatively weak, the argument for jurisdiction is strengthened by the ownership of real estate in the forum (real estate which was the intended destination of the trip that gave rise to the accident in Massachusetts). But is ownership of property in Maine sufficiently connected to Pedestrian's claim to justify the assertion of specific jurisdiction in Maine? Does Maine present a stronger or weaker argument for the assertion of specific personal jurisdiction than Connecticut where Driver owns no real estate but where he commutes to work on a daily basis? What policy rationale could one offer for distinguishing between the exercise of jurisdiction in Connecticut, New Hampshire, or Maine under these facts?[72] This hypothetical illustrates that while

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71. One might consider whether Driver would be subject to specific personal jurisdiction in New Hampshire because that is where he was headed at the time the accident took place and he has traveled through the forum on other occasions. For example, Driver has fewer contacts with New Hampshire (driving through the forum on his way to his summer home), than Driver does with Connecticut, and Pedestrian's claim is arguably not as related to the New Hampshire contacts as it is to the Connecticut contacts because he traveled through Connecticut immediately prior to the accident in Massachusetts. Thus, one might be able to conclude that New Hampshire has a weaker case for specific jurisdiction than Connecticut would have, but there is still no criteria by which one can determine whether this combination of factors is sufficient to confer specific jurisdiction.

72. *See* Richman, *supra* note 49, at 1345; *supra* notes 68-70 and accompanying text. The additional criteria suggested by Professor Richman offer little assistance in clarifying the defendant's jurisdictional exposure in each of the potential jurisdictions. For example, the defendant initiated his contact with each of the potential jurisdictions, he benefitted from the contacts with each jurisdiction, and he could foresee being sued in each forum (although arguably not for an accident that occurred in Massachusetts). To the extent that these criteria suggest that the defendant would be subject to jurisdiction in all of the potential jurisdictions, the sliding scale test could be criticized as watering down the standard for specific jurisdiction and general jurisdiction.

The analysis may be further complicated by other unrelated contacts. For example, suppose that Driver frequently calls L.L. Bean in Maine to purchase clothes and sporting goods which are mailed to his home in New York. Would these contacts be counted on the sliding scale continuum?

the sliding scale test is intuitively appealing, it does not offer a clear or predictable rule for determining the existence of specific personal jurisdiction.

2. Product Liability Hypothetical.—Applying the sliding scale test to this hypothetical, Company (defendant) would likely be subject to specific personal jurisdiction in Pennsylvania because it chose to send its product into Pennsylvania and profited from the sale there. More specifically, a proximate causal link exists between Company's distribution of the allegedly defective product in Pennsylvania and the injury that occurred in Ohio. Regardless of the quantity of products that Company distributes in Pennsylvania, Consumer's cause of action is very closely related to Company's distribution efforts in Pennsylvania.

As an Ohio citizen, Consumer would likely want to file the suit in Ohio rather than in Pennsylvania. Under the sliding scale test, Consumer could argue that because Company regularly ships a large quantity of products to Ohio, Company has a sufficiently strong relationship to the state to allow Ohio to exercise specific jurisdiction over it for this claim even though the claim does not arise out of a product Company sold in Ohio. Once again, the difficulty with the sliding scale is that it offers little or no criteria by which one may determine if the quantity and quality of a defendant's contacts justify the easing of the "relatedness" standard to cover this claim. Taking the analysis one step further, if the sliding scale test gave rise to specific jurisdiction in Ohio, would it also give rise to specific jurisdiction in any other jurisdiction where Company distributes its product? If so, what about jurisdictions where Company distributes products other than the type that injured Consumer, such as nearly identical products of a different model or different products serving the same general market?[73]

3. Hotel Drowning Hypothetical.—Applying the sliding scale test to the hotel drowning hypothetical, one must first consider the quantity of Hotel's contacts with each potential jurisdiction. Here, Hotel (defendant) has solicited discount contracts with the 500 largest companies in the United States and has entered into contracts with Employee's company in Massachusetts. Focusing on

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If so, should these contacts justify a looser relationship between Driver's contacts and Pedestrian's cause of action? If not, how can one determine which contacts belong on the continuum and which ones must be excluded?

73. In *Bird v. Parsons*, 289 F.3d 865, 874 (6th Cir. 2002), the Court of Appeals for the Sixth Circuit held that a Washington company in the business of registering Internet domain names was subject to personal jurisdiction in Ohio for a claim brought by an Ohio citizen alleging trademark violations. The court held that the defendant purposefully availed itself of doing business in Ohio by "maintaining a Web site on which Ohio residents can register domain names and by allegedly accepting the business of 4,666 Ohio residents." *Id.* at 874. Additionally, the court noted that these contacts were "at least marginally related" to the plaintiff's trademark claims because both the Ohio contacts and the plaintiff's claim "stem from [the defendant's] operation of the [defendant's] website." *Id.* at 875. Although the court did not expressly rely upon the sliding scale test, it appears that the court was willing to accept a weak nexus in part because of the quantity of business that the defendant had reaped from Ohio citizens and the fact that the injury occurred in Ohio.

Massachusetts, a court applying the sliding scale test would have to place Hotel along the jurisdictional spectrum by determining the number of contracts that Hotel has solicited and entered into with Massachusetts companies and the level of activity that has occurred pursuant to the contracts.[74] While one can easily see that Hotel's contacts with Massachusetts are not at either extreme end of the spectrum, it is difficult to determine where in the middle of the spectrum Hotel should fall. For example, should Hotel's placement on the continuum be considered relative to the contacts that it has with other forums,[75] relative to its overall income flow,[76] or relative to some other factors?[77]

Even if one assumes that Hotel's contacts with Massachusetts place it somewhere in the middle of the spectrum, one then must determine if the contacts are sufficiently related to Employee's accident in Hong Kong to justify subjecting Hotel to jurisdiction in Massachusetts. One could argue that jurisdiction is appropriate because Hotel initiated the contacts with Massachusetts by offering a discount arrangement to Massachusetts employers, it benefitted from the additional business generated by these discount arrangements, and it could foresee the possibility of an employee of a Massachusetts Company being injured while staying at Hotel. Additionally, there is a causal link, albeit not a proximate one, between the solicitation in Massachusetts and Employee's family's cause of action. Thus, although the sliding scale test does not provide a definitive answer to whether jurisdiction would be allowed in Massachusetts, it seems that Massachusetts presents a fairly strong argument for Employee's family to assert.

Taking this analysis one step further, one could make an argument for jurisdiction in every forum where Hotel solicited and entered into discount arrangements with corporate employers. In each of these jurisdictions, Hotel initiated the contacts, benefitted from the contacts, and could foresee the contacts giving rise to an injury. The only factor that distinguishes Massachusetts from every other jurisdiction where Hotel solicited business is the causal link between the solicitation in Massachusetts and this Employee's injury. While one must concede that Employee's family's cause of action is more closely related to Hotel's contacts with Massachusetts than with Hotel's contacts to other forums, it is unclear how the sliding scale test would balance the quantity of contacts with

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74. This analysis could become more difficult if Hotel has other unrelated contacts with Massachusetts and/or has been soliciting business in Massachusetts through various methods over an extended period of time. For example, it is unclear if the sliding scale test would consider Hotel's solicitation activities that occurred before or after this accident (but prior to filing the complaint).

75. For example, if Hotel earns more revenue from discount contracts that it solicited in New York than it does from discount contracts that it solicited in Massachusetts, Hotel would be closer to the general jurisdiction end of the spectrum for New York than for Massachusetts.

76. In placing Hotel along the spectrum, one could calculate the revenue from discount contracts with companies in each state as a percentage of Hotel's overall annual income.

77. For example, one might compare Hotel's forum contacts with other cases in the forum where defendants have or have not been held subject to personal jurisdiction.

each jurisdiction against the relatedness of the cause of action. For example, if Hotel had significantly greater income generated from discount contracts with New York companies than it did from Massachusetts companies, would New York become a viable forum for this suit even in the absence of a causal link between Hotel's New York contacts and this cause of action?

4. Pros and Cons of the Sliding Scale Test.—Recognizing the basic inverse relationship between the two categories of jurisdiction, the sliding scale test links the concepts of specific and general jurisdiction by placing them on the same spectrum and allowing them to melt together in the middle. The simplicity of the concept is intended to offer the benefit of avoiding "an excessively conceptualistic analysis of the notion of claim-relatedness."[78]

Notwithstanding the intrinsic appeal of this theory, the sliding scale test has an inherent tendency to dilute the requirements of both specific and general personal jurisdiction.[79] The underlying rationale of general jurisdiction rests largely upon the notion that if a defendant's ties with a forum are so significant that the defendant resembles an "insider," the defendant should expect to be sued in the forum for any dispute.[80] The underlying rationale of specific jurisdiction is also predicated largely upon the concept of expectation, such that if a defendant purposefully directs its conduct toward a forum, the defendant should foresee being hailed into the forum for claims that relate to the defendant's forum activity. Both specific and general jurisdiction provide defendant with control over its jurisdictional exposure by allowing the defendant to anticipate the consequences of its decision to conduct activities in the forum. To the extent that the sliding scale test attempts to blend the concepts of general and specific jurisdiction together, it severely weakens the defendant's ability to anticipate the jurisdictional consequences of its conduct. The sliding scale test considers all of a defendant's contacts with a forum in determining the appropriate level of relatedness that must exist between a claim and a defendant's contacts. Thus, if a defendant has a significant quantity of dissimilar contacts with a forum, the sliding scale test would allow the defendant to be sued in the forum for any cause of action that is loosely related to any of its forum contacts. In other words, the defendant would have to compensate for the large quantity of contacts that it has with the forum by giving up some of its ability to predict what types of claims it may be sued for in the forum. This tradeoff does not fulfill the underlying goals of either general or specific jurisdiction.

Moreover, the sliding scale fails to consider the temporal distinction that exists between the contacts that are considered for purposes of general jurisdiction and specific jurisdiction.[81] General jurisdiction rests upon a defendant's "continuous and systematic" forum contacts at the time that a suit is filed; specific jurisdiction, on the other hand, traditionally rests upon a

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78. *See* Richman, *supra* note 49, at 1345.

79. *See* Simard, *supra* note 15, at 570.

80. *Id.* at 567-71.

81. *Id.* at 581.

defendant's forum contacts at the time the events at issue in the litigation arose.[82] The sliding scale test blurs this temporal distinction by placing all of a defendant's contacts on a single continuum. The likely effect of this blurring is to increase the time frame from which defendant's contacts will be counted for jurisdictional purposes, pushing the defendant further along the continuum toward general jurisdiction and resulting in a decrease in the required relatedness that must be found between the contacts and the cause of action.

In addition to the theoretical difficulties that arise under the sliding scale test, the hypotheticals illustrate the practical difficulties that arise in applying the rule. In the car accident hypothetical, how should a court compare the quantity and quality of Driver's contacts with Connecticut, New Hampshire, and Maine? Is Driver's ownership of real estate in Maine more or less significant than his continuous and ongoing use of the Connecticut roadways? In the product liability hypothetical, how should the court evaluate Company's contacts with forums where it distributes a large quantity of products that are similar but not identical to the one that injured Consumer? Is the profit earned in each forum more or less important than the nature of the product or the number of sales in that state? In the hotel drowning hypothetical, how should the court assess Hotel's relationship with each state where it has solicited discount contracts? Once a court analyzes a defendant's quantity and quality of contacts with a forum, how then does the court correlate the appropriate level of relatedness—in other words, how does the relatedness requirement change in relation to a change in quantity or quality of contacts from one forum to another? These questions illustrate only a few of the issues that will arise in the application of the sliding scale test of personal jurisdiction. It seems that while this model attempts to avoid the difficulty of an "excessively conceptualistic" approach to claim relatedness, it may raise far more difficult questions than it resolves.

D. Similarity Test

Possibly the most lenient standard of relatedness that has been suggested to date is a similarity of contacts test which compares a defendant's contacts in one forum with its contacts in a different forum. Under this test, a defendant's contacts in forum A may form a basis for specific jurisdiction in forum A if these contacts are similar to defendant's contacts in forum B which gave rise to the dispute that is the subject of the litigation.[83] The similarity theory arises out of dicta in *World-Wide Volkswagen* in which the Court implied that Audi and Volkswagen would have been subject to personal jurisdiction in Oklahoma for the alleged defects in the automobile that the plaintiff purchased in New York. Specifically, the Court stated:

> When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome

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82. *Id.*

83. *See* Brilmayer, *How Contacts Count*, *supra* note 26, at 82-88.

> litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State. Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.[84]

While the Court suggests that reliance upon similar contacts in different forums may be an acceptable foundation for specific jurisdiction in certain circumstances, it is important to observe the conditions highlighted by the Court that would have made the application of such a test appropriate.

First, the Court does not suggest that isolated contacts in a forum will be sufficient to confer jurisdiction pursuant to a similarity of contacts theory. Rather, the defendant regularly availed itself of the privilege of conducting activities in the forum. Second, the Court emphasizes that the injury that is the subject of the plaintiff' suit occurred in the forum, thus recognizing the forum's interest in protecting its citizens. Third, implicit in the quoted language is a finding that the forum contacts are sufficiently similar to the contacts that gave rise to the cause of action that it would be fair to expose the defendant to jurisdiction.

The fairness issue is directly related to the defendant's expectation of jurisdiction. Specific jurisdiction rests upon the notion that when a defendant conducts activity in a forum, the defendant is able to anticipate being hailed into the forum for injuries that arise out of the forum conduct. The similarity of contacts theory expands upon this notion of expectation by recognizing that if a defendant conducts similar activities in several different locations the defendant has a similar expectation of jurisdictional exposure in all of those locations. Recognizing jurisdiction in one of the locations where the defendant had an expectation of suit may only be considered fair if the contacts in the forum are very similar to the contacts elsewhere that actually gave rise to the cause of action. Thus, the similarity of contacts theory depends heavily upon a clear definition of what contacts will be considered sufficiently similar to expose the defendant to jurisdiction.

1. Car Accident Hypothetical.—Applying the similarity of contacts theory to the car accident, one must start from the premise that Driver would be subject to jurisdiction in Massachusetts because his purposeful contact with Massachusetts was the cause of the accident there.[85] Next one must consider

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84. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (quoting Hanson v. Deckla, 357 U.S. 235, 253 (1958)).

85. In applying the similarity test, one must first consider what contacts gave rise to the dispute at issue in order to determine what contacts are sufficiently similar to serve as an alternate basis for specific jurisdiction. In this sense, the similarity test is somewhat "parasitic" upon other

whether Driver had similar contacts with other jurisdictions that would serve as a basis for specific jurisdiction.

One could argue that Driver's contacts with Connecticut are very similar to his contacts with Massachusetts because he drove through both Connecticut and Massachusetts on his way to his summer home in Maine. To the extent that the basis of jurisdiction in Massachusetts is that Driver made a deliberate decision to drive on the roads of Massachusetts and thus accepted the risk of suit there, one could argue that Driver accepted a similar risk of suit when he decided to drive through Connecticut.

If the court were to accept the similarity of contacts theory in this situation and hold that Connecticut was a reasonable jurisdiction for this claim, one could argue that the contacts that gave rise to the cause of action—driving on the highways in Massachusetts—are also similar to the contacts that Driver had with each of the states that he drove through on his way to Maine, including states like New Hampshire and Maine, if he continued his trip after the accident. Indeed, one could argue that the contacts that gave rise to the cause of action are similar to the contacts that Driver has with any state he has ever driven in, either before or after the accident.

If the similarity of contacts test is accepted without limitation, each of these forums would be a potential jurisdiction to litigate the claim arising out of the Massachusetts accident. Under these circumstances, the similarity of contacts test would greatly expand the reach of specific personal jurisdiction as currently known and significantly reduce a defendant's ability to limit his jurisdictional exposure. If one considers the limitations implied by the Court in *World-Wide Volkswagen*, however, the similarity test becomes somewhat more manageable. First, since Pedestrian's injury occurred in Massachusetts and it was caused by Driver's conduct in Massachusetts, one could argue the similarity of contacts test is not intended to apply in this situation. This case is distinguishable from the facts of *World-Wide Volkswagen*, where the plaintiff's injury occurred in Oklahoma as a result of defendant's actions in New York; in the car accident hypothetical the conduct that caused the injury took place in the same jurisdiction as the resulting injury.

Second, one could argue that the similarity of contacts theory is not intended to broaden the scope of specific jurisdiction to those jurisdictions where Driver only travels occasionally. This limitation would rule out most of the suggested jurisdictions except possibly Connecticut, where Driver regularly commutes to work.

Finally, one might argue that even Connecticut is not an appropriate jurisdiction because the similarity of contacts test is tailored to the specific factual context involved in stream of commerce cases. In stream of commerce cases, a defendant continuously reaches out to multiple forums by regularly distributing its products for sale. The continuous nature of the relationship creates an ongoing expectation of the possibility of being sued in any of the forums where the products are being distributed. The car accident hypothetical,

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theories of relatedness. Brilmayer, *Related Contacts*, *supra* note 22, at 1459.

on the other hand, does not create the same kind of continuous expectation of suit in Connecticut. Rather, on each occasion that Driver chooses to drive on the roads in Connecticut, he has an expectation that if his conduct in the state gives rise to an accident he will be sued in the state. Once he safely leaves the state, however, his expectation of being sued there ends until the next time that he chooses to drive on the roads of Connecticut.

2. Product Liability Hypothetical.—Applying the similarity of contacts test to this hypothetical, again one must start from the premise that Company would be subject to specific jurisdiction in Pennsylvania because the cause of action arose from Company's efforts to serve the Pennsylvania market. Next, one may consider whether Company's contacts with other forums are sufficiently similar to its contacts with Pennsylvania to justify extending the reach of specific jurisdiction beyond Pennsylvania.[86] If the Supreme Court's dicta in *World-Wide Volkswagen* is accepted, Ohio would present a likely jurisdiction for application of the similarity of contacts test. The facts of this hypothetical are analogous to those presented in *World-Wide Volkswagen* because, in both situations, the defendants placed their product into the stream of commerce for distribution in multiple locations, and the product was purchased by the plaintiff in one location and brought to a different location by the plaintiff where it caused injury. The exercise of jurisdiction in Ohio under these circumstances appears to satisfy all of the limitations alluded to by the Court: the injury occurred in Ohio; Company regularly distributes its products in Ohio; and Company's contacts with Ohio are very similar to its contacts with Pennsylvania.[87]

3. Hotel Drowning Hypothetical.—In applying the similarity of contacts theory to the facts of this hypothetical, one must first determine a forum where specific personal jurisdiction would exist as a baseline before one may consider whether other similar contacts would provide additional jurisdictional choices. Applying the substantive relevance theory to determine a baseline jurisdiction, one may argue that the facts surrounding Hotel's solicitation of business from Employee's employer is substantively relevant and that Massachusetts is an appropriate jurisdiction for a breach of contract suit. Applying the "but for" test would lead to the conclusion that Hotel would be subject to specific jurisdiction

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86. The extent of similarity or difference among the products distributed in different jurisdictions might affect Company's expectation of suit in those jurisdictions and therefore offer a basis to reject the application of the similarity of contacts test.

87. One might take the above analysis a step further and suggest that the similarity of contacts test would support the assertion of jurisdiction in any state in the country because Company purposefully serves the market for its widgets in every state. To the extent that jurisdiction may be based solely on similar contacts, Company's relationship with Pennsylvania, Ohio, and all of the other states would be very similar—Company regularly distributes similar or identical products in each state. This interpretation of the similarity test would not expand the number of jurisdictions in which Company may be sued (Company has jurisdictional exposure in every forum that it distributes its products), nor would it expand the number of suits that may be brought against Company (the number of suits brought against defendant would remain the same, plaintiff would just have more choices of where to bring the suit).

in Massachusetts because it purposefully reached out to Massachusetts by soliciting business from employers in the state. Finally, applying the sliding scale test for relatedness to this factual scenario, one would have to consider the quantity and quality of Hotel's contacts with Massachusetts and the relationship between the solicitation and the accident that occurred in Hong Kong.[88]

If one assumes that Massachusetts is the most likely baseline jurisdiction under any of the tests, then one must consider whether the similarity of contacts test would suggest other possible jurisdictions. One could argue that Hotel has solicited business and entered into similar corporate discount contracts in many forums, thus creating a regular stream of customers from each forum. Additionally, as long as the corporate discount agreements are sufficiently similar, Hotel has an expectation of suit in any of the jurisdictions where it solicited business through such discount contracts.[89]

4. Pros and Cons of Contacts Test.—The similarity of contacts test is most suited for application in stream of commerce cases where fungible products are distributed widely. As illustrated in the product liability hypothetical, corporations that regularly place their products into the stream of commerce for distribution and sale in many different locations have a continuous expectation of suit in any of those locations. The fungibility of the products and the wide scale nature of the distribution allow corporations to make generalized distribution plans for large quantities of product to be distributed in many different locations without regard to the ultimate destination of any particular product or the identity of its purchaser. The defendant cannot predict which particular products will prove to be defective or where such defects will manifest themselves. Rather, the defendant may only predict that a certain percentage of the overall pool of products will be defective.

Thus, the defendant must plan for the contingency of litigation in all of the jurisdictions where it distributes its product by obtaining insurance and passing the associated costs on to all consumers. Limiting specific jurisdiction to the single jurisdiction where the defendant actually sent the defective product which caused the plaintiff's injury fails to recognize the reality of the defendant's jurisdictional expectation. The similarity of contacts test acknowledges that in a stream of commerce case the defendant's contacts with each of the forums where it distributes similar products are as fungible as the products themselves.

The similarity of contacts test does not apply well in situations where the

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88. *See* Nowak v. Tak How Invs., Ltd., 94 F.3d 708, 717 (1st Cir. 1996) (holding that personal jurisdiction exists in Massachusetts).

89. The only difficulty with applying the similarity of contacts test in this case is the fact that the injury arose in Hong Kong, not in any of the states where Hotel solicited business. If one accepts the limitations implied by the Court in *World-Wide Volkswagen*, no forum would satisfy the requirements of the similarity test because Employee's injury did not arise in any of the potential forums. This case is distinguishable from the facts of *World-Wide Volkswagen* where the defendant's conduct in New York led to the plaintiff's injury in Oklahoma. Here, the defendant's conduct in Massachusetts led to the plaintiff's injury in Hong Kong, thus weakening any forum state's interest in adjudicating the dispute.

defendant's relationship with a forum is not ongoing and continuous. For example, Driver in the car accident hypothetical would be subject to jurisdiction in Massachusetts because he purposefully chose to drive in the state and thus accepted the risk of suit if he caused an accident there. If Driver could be subject to suit in any jurisdiction where he had "similar" contacts, he could arguably be hailed into any state where he has ever driven for the purpose of litigating the Massachusetts accident. Unlike the stream of commerce situation, however, each instance of driving on the roads of a jurisdiction is a separate episode for which Driver accepts the risk of being sued for events that arise while he is driving in the state. Once Driver safely leaves a state without causing any harm, the risk of being sued in the state evaporates. Thus, unlike the stream of commerce situation where the defendant continuously sends fungible products into multiple forums and therefore must continuously expect the possibility of being sued in any of those forums, here Driver's expectation of suit begins and ends with the occurrence of the factual episode.

Finally, the similarity of contacts test poses several practical difficulties. The primary difficulty in applying this test is determining how similar the defendant's contacts in one forum must be to contacts in a different forum. In the product liability hypothetical, for example, if Company distributes fifty different makes/models/styles of a widget, should one measure the similarity of the contacts with each forum according to the make, model, or style of the product distributed, a more general view of the function of the product, the time frame within which the distribution took place, or according to some other variable?

The similarity problem also exists outside of the stream of commerce example. As illustrated in the car accident hypothetical, Driver could be deemed to have "similar" contacts in every forum that he drove through on the trip that culminated in the accident at issue in the lawsuit, or taken one step further, he could be deemed to have "similar" contacts with any forum that he has ever driven in. If one argues that some of these contacts are not sufficiently similar to the contacts with Massachusetts to justify the exercise of jurisdiction for the Massachusetts accident, how does one define the distinguishing characteristics to allow differentiation between those contacts that are similar and those that are not?

A related problem that arises in applying the similarity test is the need for a benchline jurisdiction from which to compare the defendant's contacts with other forums. In other words, before one can determine if the defendant's contacts with Forum A are sufficient to justify jurisdiction, one must be able to compare them with the contacts in Forum B where the defendant would be subject to jurisdiction. The need for a baseline jurisdiction illustrates that the similarity test could not be the sole test for determining specific jurisdiction; it can only be a test that is applied in conjunction with another test for the purpose of expanding the reach of jurisdictional exposure.

The following is a chart which illustrates the application of the four tests in each of the hypotheticals and the forums which likely would have specific jurisdiction under each of the tests:

	1. Car Accident Hypothetical	2. Product Liability Hypothetical	3. Hotel Drowning Hypothetical
Substantive Relevance/Proximate Cause Test	Massachusetts	Pennsylvania	Massachusetts (possibly for contract action; not for tort)
"But For" Causation Test	Massachusetts Connecticut?	Pennsylvania	Massachusetts
Sliding Scale Test	Massachusetts Connecticut? New Hampshire? Maine?	Pennsylvania Ohio? Other states where product is sold?	Massachusetts Other states where Hotel solicited sales?
Similarity Test	Massachusetts = baseline Other states where Driver has driven?	Pennsylvania = baseline Other states where product is sold?	Massachusetts = baseline Other states where Hotel solicited sales?

This chart illustrates several interesting facts. First, the substantive relevance/proximate cause test is the least ambiguous and most restrictive of the tests analyzed, authorizing specific jurisdiction in the fewest number of forums. Second, the forums which satisfied the substantive relevance test also satisfied the requirements of the three other tests, suggesting that if a defendant's conduct in the forum is substantively relevant to the claim, the forum should have specific jurisdiction to adjudicate the resulting dispute. Third, the remaining tests ("but for," sliding scale, and similarity) seem to indicate that although the substantive relevance test provides a clear and predictable tool for determining specific jurisdiction, in certain instances it may be desirable to expand the reach of personal jurisdiction beyond the strict confines of the substantive relevance rule.

IV. TWO PROFILES OF SPECIFIC JURISDICTION: EPISODIC CONTACTS VS. SYSTEMATIC CONTACTS

The analysis of the existing theories of relatedness in the previous section illustrates that none of the theories completely responds to the purposes and goals of the minimum contacts doctrine. This section draws upon the strengths and weaknesses of these theories and suggests that the scope of specific jurisdiction should depend upon whether a defendant's forum contacts are limited in time and purpose (episodic specific jurisdiction) or whether a defendant's forum contacts are ongoing and systematic (systematic specific jurisdiction).

The basic requirements of minimum contacts are well established: (1) the defendant must have purposeful contacts with the forum; and (2) the contacts must be related to the cause of action that is the subject of the jurisdictional

inquiry.[90] In *Burger King*, the Court emphasized the importance of these criteria in providing defendants with the ability to predict and control their jurisdictional exposure, stating that:

> individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign," . . . the Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."[91]

A defendant exercises control over its jurisdictional exposure at the time that it decides whether to reach out to a forum state. It is at this time that the defendant must consider whether the "benefit" of the contact is worth the "burden" of answering to potential claims in the jurisdiction. In calculating the jurisdictional burden, the defendant will anticipate the factual consequences that could arise from its forum conduct, and the possible causes of action that might flow from such consequences. Thus, the "jurisdictional burden" of contacting the forum should approximate the defendant's expectation that it might be hailed into that forum for any cause of action that it could anticipate arising from its forum contacts.[92]

This Article suggests that a critical aspect of the defendant's expectation of jurisdiction depends upon whether the defendant contacts the forum for a limited time and purpose (episodic contact) or whether the defendant creates an ongoing systematic relationship with the forum (systematic contact). Episodic contacts are singular in nature, meaning that the defendant makes a decision to reach out to a forum for a particular purpose and the contact ends upon the completion of the purpose. A defendant may engage in a series of episodic contacts, but each contact remains a discrete, independent episode that is not dependant upon the existence of any other contact. Systematic contacts, on the other hand, involve a series of similar contacts that are dependent upon, and arise from, an ongoing relationship that exists between the defendant and the forum. Systematic

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90. A finding of minimum contacts must be accompanied by a consideration of whether the exercise of jurisdiction would be fair and reasonable in light of the circumstances of the case. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985).

91. *Id.* at 472 (quoting Shaffer v. Heitner, 433 U.S. 186, 218 (1977); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

92. Justice Brennan has asserted that basing jurisdiction on the defendant's ability to foresee jurisdiction merely begs the question because a defendant cannot anticipate jurisdiction until the law declares the criteria for asserting jurisdiction. *World-Wide Volkswagen*, 444 U.S. at 311 n.18 (Brennan, J., dissenting). Although this assertion is superficially appealing, it fails to recognize that whenever an individual acts, in his own home forum or elsewhere, that individual must anticipate the consequences of his action and the possibility of being sued for an injury that arises out of the consequences of his action. If the individual acts in his home forum, the jurisdictional question is easy (he is subject to general jurisdiction). If he chooses to act outside of his home forum, he should expect to answer for the consequences of his actions in the forum where he acted.

contacts require little individualized decision making because once the defendant establishes the ongoing relationship, the contacts flow until a decision is made to end the relationship.

A. Episodic Specific Jurisdiction

When a defendant makes a decision to contact a distant forum for a limited time and purpose, that is engage in an episode, the defendant must analyze whether the benefit of the contact is worth the jurisdictional burden that will result from the contact. In gauging the jurisdictional burden of any forum episode, the defendant must anticipate: (1) that its forum conduct may give rise to factual consequences that could be the subject of litigation in the forum; and (2) that when its forum episode ends, the jurisdictional exposure associated with that episode will be fixed and determinable.[93] The first of these considerations is somewhat speculative, requiring the defendant to consider all of the possible consequences that could reasonably flow from his or her forum conduct. At this time, the defendant will not necessarily be able to anticipate the details of his or her jurisdictional exposure (such as who will be injured by the defendant's conduct, what the cause or extent of injury is likely to be, or the amount of damages that might be sought), but it should be able to anticipate the basic parameters of a claim that might arise, i.e., a story that might provide the basis for a potential legal claim. For a defendant considering an episodic contact with a forum, the second consideration provides a more definite gauge of the potential jurisdictional exposure. Although the defendant cannot anticipate how, or even whether, its forum conduct will give rise to a specific claim (because the conduct has not occurred at the time that the defendant must make this judgment), the defendant can anticipate the point in time when its contact with the forum will end (when the purpose of the episode is complete) and thus can anticipate that when the episode is complete its jurisdictional exposure will be limited to events that arose out of the episode. For example, at the time that a defendant decides to engage in a forum episode, it should have the assurance that if its forum episode ends without giving rise to facts that are the subject of future litigation, then the jurisdictional exposure associated with this forum contact will evaporate. Alternatively, if the forum episode gives rise to facts that are the subject of future litigation, then the jurisdictional burden should be limited to answering to the claims that arise out of the episode.

Thus, when a defendant engages in episodic conduct in a forum, a court should determine the scope of specific jurisdiction by asking: (1) what factual consequences could the defendant anticipate would arise from its forum conduct; and (2) did any of those anticipated consequences actually occur as a result of the forum conduct? If the defendant's forum conduct would have allowed the defendant to expect the factual consequences that actually resulted from the episode, specific jurisdiction should exist. This test would subsume the

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93. In other words, once the episode is complete the defendant should be able to rely upon the actual events that occurred rather than speculating about what might have occurred.

substantive relevance test, but potentially extend to a broader category of cases. Thus, if the defendant's contacts are substantively relevant to the plaintiff's claim, the claim would fall within the scope of specific jurisdiction. Moreover, even if the defendant's contacts are not substantively relevant to the plaintiff's claim but the defendant could have anticipated the facts that actually resulted from its forum conduct, then specific jurisdiction should exist.

In the car accident hypothetical, Driver made a decision to drive through Massachusetts on his way to Maine. This contact would be considered an episodic contact because Driver engaged in the contact for the purpose of reaching Maine on this particular occasion, the contact had a clear beginning and ending point, and the decision to travel through Massachusetts was independent of other contacts with Massachusetts—it was not one of a series of contacts arising from a systematic relationship with Massachusetts. Prior to engaging in this episode in Massachusetts, Driver could anticipate the possible consequences of his conduct: he could be involved in a car accident in the forum, or he could drive safely through the forum without incident. While he could not anticipate all of the details of a potential claim against him,[94] Driver could rely on the fact that his jurisdictional exposure would be limited to claims that arose out of this episode in Massachusetts. If this forum episode ended without causing an injury in the state, Driver's jurisdictional exposure for this contact would end; alternatively, if this forum episode caused an injury in the state, Driver could be sued for that injury, but not for a similar injury that he caused driving through another forum on a different occasion. The substantive relevance test would likely be satisfied here because Driver's forum conduct will be evidence of Pedestrian's claim.

Alternatively, suppose a citizen of New York calls a citizen of Massachusetts at his office in Boston to solicit business. If the Massachusetts citizen then travels to New York where the parties negotiate and execute a contract, could the Massachusetts citizen file suit for breach of the contract in Massachusetts on the basis that the New York citizen (defendant) solicited the business in the forum? Under a strict substantive relevance test, the fact that the defendant called the plaintiff in Massachusetts is not relevant to proof of the breach of contract. Under the suggested approach, a court would consider: (1) whether the defendant could foresee that its solicitation could give rise to a contract; and (2) whether the solicitation did in fact give rise to the contract that is the subject of the action. Applying this test, the court would have to consider the facts surrounding the solicitation, to determine whether the contact was sufficiently detailed to allow the defendant to anticipate the resulting business contract.

B. Systematic Specific Jurisdiction

When a defendant engages in systematic contacts with a forum, it makes a decision to maintain an ongoing relationship with the forum, typically (although

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94. Driver could not anticipate who the plaintiff would be, where or how the accident would take place, or the extent of damages.

not necessarily) a commercial relationship, pursuant to which individual contacts are intended to flow routinely. The defendant exercises control over its jurisdictional exposure at the time that it chooses to create the ongoing forum relationship (as opposed to at the time that each individual contact arises) because it is at this time that the defendant can evaluate whether the benefit of the forum relationship is worth the associated jurisdictional burden. When a defendant makes a decision to engage in an ongoing systematic relationship with a forum, it can anticipate that its conduct with the forum may give rise to factual consequences that could be the subject of litigation in the forum. As with episodic contacts, the defendant will not necessarily be able to anticipate the details of its jurisdictional exposure (the who, what, or where), but it should be able to anticipate the basic skeleton of a story that could provide the basis for a potential legal claim.

Unlike when a defendant engages in episodic contacts and can anticipate the end of each episode, when a defendant engages in ongoing systematic contacts it does not anticipate an end to the flow of contacts. Rather, the defendant is seeking a long-term relationship with the forum and thus must anticipate long-term jurisdictional exposure. At any time during the existence of the systematic relationship, the defendant expects that individual contacts will flow from the relationship and thus must expect that these contacts may give rise to factual consequences that could be the subject of litigation in the forum.

Under these circumstances, limiting jurisdiction to a particular contact is an inappropriately narrow gauge of the jurisdictional burden. Although each individual contact will have an end point, the defendant cannot expect that its jurisdictional exposure will be limited to causes of action that arise out of each individual contact because as one contact ends, the defendant is expecting—indeed hoping—that the series of contacts will continue. In other words, because the flow of contacts is continuous, the jurisdictional expectation must be continuous. When the defendant creates an ongoing systematic relationship with a forum, it accepts a broader scope of jurisdiction in exchange for the ongoing benefits that flow from the relationship. Thus, while a defendant maintains such an ongoing, systematic relationship with a forum, the contours of specific jurisdiction should be defined according to the characteristics of the overall relationship with the forum. Defendants must anticipate that their jurisdictional exposure remains open to any claim that could result from the ongoing series of contacts within the systematic relationship.

The product liability hypothetical poses an excellent example of a defendant engaged in ongoing systematic contacts with many forums. Specifically, Company has created distribution channels pursuant to which Company sends a steady flow of its products into many forums. Company's contacts are not episodic because once the distribution relationships are established, Company will routinely continue to send products into each forum. At the time that the New York Company decided to distribute its products in every state in the country, it could anticipate that its widgets could cause injury to a consumer in any one of the forums where it chose to distribute the product. It could not anticipate which widget would be the subject of litigation or where such an injury would arise; thus, it had to expect jurisdictional exposure in every forum that it

distributed widgets. Under the facts of the hypothetical, the substantive relevance test would inappropriately limit the scope of specific jurisdiction to Pennsylvania because the product that allegedly caused Consumer's injury actually was distributed by Company in Pennsylvania. This Article suggests that systematic specific jurisdiction for Consumer's claim should extend to any forum where Company distributes widgets as long as the cause of action is one that Company would have anticipated as being within the category of claims that could arise from its sales of widgets.[95]

The hotel drowning hypothetical poses another example of a defendant engaged in a systematic relationship with the forum. When Hotel sent its direct mail solicitation to companies all over the United States, it sought to create an ongoing relationship with the states where these companies were located. Once these relationships were established, Hotel intended to derive an ongoing flow of business from each forum. Specifically, in deciding to enter into a discount contract with the Massachusetts Company, Hotel could evaluate whether the benefit of the relationship was worth the jurisdictional burden that would arise from the relationship. In evaluating the jurisdictional burden, the defendant could anticipate that the contract would create an ongoing relationship with Massachusetts which would give rise to a flow of visitors to Hotel in Hong Kong (indeed this is what Hotel hoped for), and that any one of these visitors could be injured while staying at Hotel.[96] Thus, when Hotel reached out to Massachusetts, it could be subject to jurisdiction in Massachusetts for a suit brought by Employee who traveled to Hotel as a result of the discount contract and suffered an injury while on the premises.[97]

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95. Under the suggested analysis, Consumer could assert systematic specific jurisdiction over the New York Company in every state where it distributes widgets because Company's ongoing relationship with each of these forums requires it to expect that any of the widgets that it distributes in these forums could cause injury and thus be the subject of litigation. It would not matter that Consumer's injury occurred in Ohio because the type of claim that Consumer is bringing is within the scope of claims that Company must anticipate in each of the forums. To the extent that a plaintiff seeks to file suit in a state that has little or no connection to the claim, a defendant may seek to transfer the case pursuant to 28 U.S.C. § 1404 or § 1406 (2000).

96. Hotel could not anticipate which visitor would be injured, how an injury might arise, or even the extent of the injury, but Hotel could anticipate that one of the employees who visited the hotel pursuant to the terms of the discount arrangement could be injured while on the premises of the hotel property.

97. The Massachusetts Employee would also be able to acquire systematic specific personal jurisdiction over the Hong Kong Hotel in any state where Hotel solicited similar discount contracts because in each of these forums Hotel would have an expectation that its conduct in entering into this type of systematic relationship could give rise to jurisdiction for this type of claim. Notwithstanding the apparent breadth of jurisdictional authority that would arise from ongoing, systematic contacts, this is still well short of the authority conferred by general jurisdiction. For example, absent additional facts, systematic specific jurisdiction in Massachusetts would not extend to a claim relating to a disgruntled employee of Hotel, or a claim relating to breach of a contract for food supplies for Hotel, or even a claim by a plaintiff who was injured at Hotel if that plaintiff

C. Pros and Cons of Episodic and Systematic Specific Jurisdiction

By distinguishing between episodic and systematic contacts as a basis for specific jurisdiction, this Article suggests a new approach for defining the contours of specific jurisdiction that more accurately meets the constitutional purpose of the doctrine and avoids many of the problems that are associated with the existing theories for defining specific jurisdiction. This approach is based upon the basic distinction that a defendant who engages in a single episode in a forum, or a series of finite episodes, should have a narrower expectation of jurisdictional exposure than a defendant who engages in an ongoing, systematic relationship with a forum. By tailoring separate criteria for defining the limits of episodic and systematic specific jurisdiction, the approach suggested herein is able to capture many of the advantages of the existing theories while avoiding some of the practical and theoretical disadvantages. For example, many of the benefits of the substantive relevance test (i.e., analytical clarity, predictability, and efficiency) will be accomplished under the approach suggested in this Article because the tests for episodic and systematic jurisdiction will be satisfied by contacts that are substantively relevant to the claim. In recognition that flexibility is an important component of the minimum contacts philosophy of "fair play and substantial justice,"[98] however, the criteria for defining episodic and systematic jurisdiction are not woodenly limited to the elements of the applicable substantive law. As such, the criteria for both categories of specific jurisdiction suggested herein provide sufficient flexibility for courts to look at the facts that contributed to the situation at issue in a lawsuit, whether those facts are substantively relevant or not, thereby avoiding undue reliance upon local pleading rules or the vagaries of particular substantive laws.

The test for episodic specific jurisdiction bears some similarity to the "but for" test in that it expands the reach of specific jurisdiction to include consideration of facts that might not be substantively relevant to the suit, but which played a role in generating the situation that culminated in the claim.[99] The criteria for episodic jurisdiction, however, are not as loosely defined as the "but for" test and thus provide more guidance for determining when a "contributing" factor is too remote to be jurisdictionally significant. For example, when one applies the "but for" test to the car accident hypothetical, it is unclear if Driver's decision to drive through Connecticut was a "but for" cause of the accident in Massachusetts or merely a historical cause of the accident.[100] Applying the criteria for episodic jurisdiction, one would ask: (1) could Driver anticipate that his decision to drive through Connecticut could lead to an accident in Massachusetts, and (2) did Driver's conduct in Connecticut give rise to the

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arrived at Hotel without being enticed by an ongoing, systematic discount arrangement similar to the contract that existed between Hotel and the Massachusetts Company.

98. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

99. *See supra* text accompanying notes 51-57.

100. *See supra* text accompanying notes 58-61.

Massachusetts accident? In answering these questions, it is important to note that the relevant "episode" is defined according to Driver's forum conduct, not the overall trip on which Driver was embarking. Thus, although Driver was on a trip to Maine when he traveled through Connecticut and Massachusetts, his relationship with each forum is a separate jurisdictional episode. Applying these criteria to the jurisdictional question, Driver would anticipate that his decision to drive through Connecticut could give rise to an accident in Connecticut or that he might leave Connecticut without causing an accident. Putting aside the chronological relationship between his episodes in Connecticut and Massachusetts on this trip, there is no link between how he drove in Connecticut and the accident in Massachusetts. Moreover, when Driver's episode in Connecticut ended without causing an accident (the episode ended at the time he left Connecticut, not at the time that he arrived at his ultimate destination in Maine), Driver should have the assurance that his jurisdictional exposure for this Connecticut episode had evaporated.

In addition to identifying the criteria for episodic jurisdiction, this Article suggests that a defendant who engages in ongoing, systematic contacts with a forum should be subject to broader jurisdictional exposure than someone who engages in more limited conduct. This distinction picks up on the theoretical appeal of the sliding scale concept but provides more specific criteria for defendants to anticipate their jurisdictional exposure. Unlike the sliding scale test—which requires courts to weigh all of a defendant's forum conduct together (whether similar or dissimilar to the conduct that gave rise to the claim)—the criteria for systematic jurisdiction avoids the "piling on phenomenon" and focuses on the defendant's expectation of the factual consequences that might arise from his or her contacts. Moreover, the test for systematic jurisdiction avoids one of the most difficult determinations inherent in the sliding scale test: if a defendant has a little more contact than another defendant, how much less related may the claim be to those contacts? Systematic jurisdiction avoids this difficulty because any defendant engaged in an ongoing, systematic relationship with a forum will be subject to the same criteria for determining the scope of jurisdictional authority (i.e., defined according to the factual consequences that the defendant could anticipate arising from its systematic relationship with the forum).

While the profiles for specific jurisdiction suggested in this Article offer numerous advantages over existing theories for defining specific jurisdiction, the criteria for applying episodic and systematic jurisdiction are not unambiguous. The test requires courts to consider the factual consequences a defendant "should expect" to arise from its forum contacts and then determine whether a specific cause of action fairly fits within the defendant's expectation of jurisdiction. In order to maintain a legal standard that hinges upon notions of "fair play" and "substantial justice," however, one must accept the reality that there is no black letter rule that will unambiguously define jurisdiction in every situation. Rather, the profiles presented herein are intended to provide a framework that will guide courts to make consistent judgments based upon the factual context of each case.

Particular applications of the profiles suggested herein may pose more difficulty than others. For example, consider a defendant who offers products for

sale via the Internet. Ordinarily, a defendant would have to invest time and/or money to reach out to a particular forum to create an ongoing, systematic relationship that will give rise to subsequent individual contacts. Prior to investing the time or money for such a relationship, the defendant has the opportunity to evaluate the jurisdictional burden that will be generated by the relationship. The Internet, however, removes much of the need to reach out to a particular forum. Rather, a defendant need only create a Web site in order to solicit sales anywhere in the world, thereby largely obviating the investment of time or money to create a relationship with a particular forum. Should such a Web site create a systematic relationship with every forum that may access the site? If the Web site does not create a systematic relationship with every forum that may access the site, should one consider every sale that arises from a Web site a single episode, even though the defendant must maintain an ongoing expectation of suit in any forum where it continuously solicits sales (arguably any forum that may access the site)? This ambiguity highlights an important, and unavoidable, fact: the minimum contacts test is fact intensive. Rather than expecting to subject every defendant who conducts Internet business to the same scope of jurisdictional exposure, one must take a closer look at the context of each situation to determine whether a defendant's contacts should be characterized as episodic or systematic jurisdiction. For example, to characterize the defendant's relationship with each forum where it has Internet customers, one might consider: (1) the history of the relationship with each potential forum (whether the defendant has experienced a regular flow of contacts with the forum from which it might anticipate that contacts with that forum will be ongoing); (2) whether the Web site is active, interactive, or passive;[101] and (3) whether the defendant has reached out to the particular forum to solicit customers and/or to supplement its Internet contacts. Thus, while the categories of episodic and systematic jurisdiction will not resolve all of the ambiguity inherent in making difficult jurisdictional decisions, the overall framework that is suggested herein will help to provide courts and litigants with guidance for making these determinations.

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101. In *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (citations omitted), the court described a sliding scale test for determining jurisdiction based upon Internet activity in a forum:

> [T]he likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. . . . At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end . . . a defendant has simply posted information on an Internet Web site which is accessible to [forum resident] users . . . . The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer.

D. A Case Study: Gator.com v. L.L. Bean

To illustrate how the framework set forth in this Article may help to resolve difficult jurisdictional questions, one might reconsider *Gator.com v. L.L. Bean*.[102] As noted in the Introduction, Gator filed a declaratory judgment action against Bean in a federal court in California. Gator argued that its software product did not violate Bean's intellectual property rights and did not violate competition laws. Bean moved to dismiss the complaint for lack of personal jurisdiction on the ground that: (1) its contacts with California were not substantial and continuous enough to give rise to general jurisdiction; and (2) its California contacts did not give rise to the plaintiff's cause of action, thus failing the requirements for specific jurisdiction.

Bean's contacts with California may be summarized as follows: total sales to California residents approximated 6% of the company's total sales (this is an aggregate of sales resulting from the Web site, catalogues, and the toll free telephone number);[103] a substantial mailing list of California residents to whom Bean mailed a substantial number of catalogues; direct email solicitation to California residents; a substantial number of on line accounts for California residents; marketing efforts which included California; and numerous California vendors from whom the company purchased its supplies.[104]

Applying these facts to the ideas presented herein, the author of this Article would first suggest that this case does not meet the standard for general jurisdiction. It is easy to resort to general jurisdiction in difficult personal jurisdiction cases, but the thesis of this Article rests upon the notion that general jurisdiction should be limited to those situations where the defendant is akin to an insider in the forum.[105] Here, Bean is not incorporated in California, it does not have an address in California, and it has not consented to jurisdiction. Thus, the analysis should focus on whether specific jurisdiction may be exercised under these facts.

If one accepts the premise of this Article, the next step would be to determine if Bean's contacts with California are episodic or systematic. Bean's sales history in California has been significant (6% of total sales) and the company has no reason to believe that its sales in California will change significantly (more or less) in the future. At the completion of each sale, Bean does not anticipate that its relationship with California is complete, but rather it hopes that its sales within the forum will continue. Indeed, by regularly sending catalogues and email solicitations into the forum and by including California in its ongoing marketing efforts, Bean has established a system from which it expects sales

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102. Gator.com Corp. v. L.L. Bean, Inc., 341 F.3d 1072 (9th Cir. 2003), *vacated by, reh'g, en banc, granted*, 366 F.3d 789 (9th Cir. 2004).

103. *Id.* at 1078. Bean conceded that its Web site was interactive and the court characterized the site as a "sophisticated virtual store in California."

104. *Id.*

105. *See* Brilmayer, *How Contacts Count*, *supra* note 26, at 80-81; Twitchell, *supra* note 22, at 633; Von Mehren & Trautman, *supra* note 19, at 1137.

from California to flow. Thus, one may conclude that Bean has a systematic relationship with California, and therefore it should expect that its jurisdictional exposure in California would include any lawsuit concerning factual consequences that might arise from this relationship.

Applying the profile for systematic specific jurisdiction, Bean should anticipate being sued in California for consequences that might arise from the sale of its product. The facts of this case, however, do not involve a cause of action regarding a sale of products—quite to the contrary, the cause of action focuses on the legality of Gator's attempt to divert potential Bean customers away from Bean's Web site, thereby preventing California residents from transacting with Bean. Herein lies the difficult part of the analysis. Based upon Bean's overall marketing/sales relationship with residents of California, could Bean anticipate that it might be sued in California regarding the legality of a software program that is intended to interfere with the execution of a transaction between a California resident and Bean? For several reasons, it seems that this cause of action should be deemed beyond the scope of systematic specific jurisdiction. First, looking at Bean's non-Internet sales/marketing contacts (catalogues, toll free telephone number, etc), it is fairly easy to determine that Bean would not expect these contacts to give rise to an occurrence involving the Gator software program. Specifically, since the program attempts to divert Internet sales, it would have no impact on sales made via other means (for example via telephone). Therefore, if Bean's only contacts with California were non-Internet related, there would be no expectation of jurisdiction for this type of occurrence and no systematic specific jurisdiction for the declaratory judgment action filed by Gator. Second, looking at the Internet sales activity, it is important to note that the sequence of events that leads to each diversion of a customer begins long before the customer goes to the Bean Web site. The Gator program is distributed to an individual's computer during a prior transaction and that program automatically executes itself while the customer is visiting the Bean site. Although the Bean Web site is interactive, the Gator program attempts to divert the customer from the site before there is a chance for any interaction or exchange of information. At this point in the sequence of events, Bean has done nothing to avail itself of this Internet sale. Both episodic and systematic jurisdiction must rest upon the purposeful conduct of the defendant, not the unilateral activity of a third party. This scenario is well beyond the factual consequences that Bean would anticipate arising from its marketing efforts to California residents and thus systematic specific jurisdiction should fail in this situation.

CONCLUSION

The minimum contacts doctrine is based upon the notion that the exercise of jurisdiction over a defendant is fair if the defendant has the ability to predict and control its jurisdictional exposure. Yet, the Supreme Court has neglected to clearly define the criteria by which courts are to define the scope of either general or specific personal jurisdiction, leading to a blurring of the concepts and disagreement among courts and scholars as to the appropriate contours of both

types of jurisdiction. This Article focuses on defining the scope of specific jurisdiction to accurately reflect the purpose of the doctrine and suggests that it is a mistake to assume that all assertions of specific jurisdiction may be defined according to a single set of criteria. Rather, the purpose of specific jurisdiction is best achieved by creating two profiles of specific jurisdiction, episodic specific jurisdiction and systematic specific jurisdiction. These profiles would share the basic characteristics of specific jurisdiction (conferring limited jurisdictional authority) while also recognizing that the scope of specific jurisdiction should depend upon whether the defendant expects its forum conduct to be of a finite nature or whether the defendant intends to create an ongoing, systematic relationship with the forum.

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PROGRAM ON LAW AND STATE GOVERNMENT FELLOWSHIP SYMPOSIUM

Maximizing Judicial Fairness & Efficiency: Should Indiana Consider Creating an Office of Administrative Hearings?

INTRODUCTION: EVALUATING STATE GOVERNMENT DESIGNS OF EXECUTIVE BRANCH ADJUDICATION

CYNTHIA A. BAKER*

Since its inception in 1997, the Program on Law and State Government has been dedicated to fostering the study and research of critical legal issues facing state governments. To that end, the Program on Law and State Government Fellowships offer an extracurricular academic opportunity for students interested in contributing to the contemporary scholarship of law and state government.[1] This year's Program on Law and State Government Fellowship Symposium, *Maximizing Judicial Fairness & Efficiency: Should Indiana Consider Creating an Office of Administrative Hearings?*,[2] culminated the ideas, research, and work of the 2004 Program on Law and State Government Fellows, Julie Keen[3] and Brian Berg.[4] Designed to challenge the participants toward a better understanding of the institutions of administrative adjudication within state government, the event ultimately invited those gathered to draw connections

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1. Awarded on a competitive basis, the Program on Law and State Government Fellowships allow two students the opportunity to work together for one year exploring a topic of their choice concerning a critical legal issue facing state governments in exchange for a tuition credit of up to $5000. Working with the Director of the Program on Law and State Government, Fellowship responsibilities include hosting an academic event and completing an academic paper.

2. The Program on Law and State Government Fellowship Symposium, *Maximizing Judicial Fairness & Efficiency: Should Indiana Consider Creating an Office of Administrative Hearings?*, was held on October 1, 2004, in the Wynne Courtroom of Indiana University School of Law—Indianapolis.

3. Program on Law and State Government Fellow, 2004. J.D. Candidate, 2006, Indiana University School of Law—Indianapolis; B.S., *with highest distinction*, B.A., *with highest distinction*, 2003, Indiana University.

4. Program on Law and State Government Fellow, 2004. J.D. Candidate, 2006, Indiana University School of Law—Indianapolis; B.S., 1994, Indiana State University; M.A., Public Policy, 2002, College of William and Mary.

between state government design, democracy, and justice.

Writing as Publius in Federalist No. 45, James Madison assured those wary of a strong federal government that, "[t]he powers reserved to the several States will . . . concern the lives, liberties, and properties of the people and the internal order, improvement, and prosperity of the State."[5] State governments' unique positions of authority and responsibility with respect to the "lives, liberties, and properties of the people"[6] make states powerful examples of government design of the adjudicatory function within the executive branch. States' individual approaches to government design of the administrative function provide prisms through which we, as actors and recipients of the benefits and burdens of the modern administrative state, understand administrative adjudication. In keeping with the mission of the Program on Law and State Government, the Fellowship Symposium provided the over 100 law students, lawyers, and policymakers in attendance an opportunity to participate in the confluence of contemporary scholarship and state government policy. To do this, most of the attendees took a break from the administrative law culture with which they are familiar—Indiana's—to explore a variety of administrative adjudicative systems designed to reflect other states', and their respective citizens', expectations of democracy and justice.

With *Crowell v. Benson*, the U.S. Supreme Court essentially ratified the administrative branch.[7] Chief Justice Hughes, delivering the opinion for the Court, held that "the findings of [an administrative commissioner], supported by evidence and [acting] within the scope of his authority, shall be final."[8] Justice Hughes went on to say, "[t]o hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert, and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task."[9]

More than seventy years of jurisprudence, state experimentation, and implementation of what has been called "rational democracy"[10] have passed since *Crowell*'s approval of the fourth branch of government.[11] The resulting modern administrative state has turned, in the minds of some scholars, the "prompt, continuous, expert, and inexpensive method"[12] described by Justice Hughes into

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5. THE FEDERALIST NO. 45, at 363 (James Madison) (John C. Hamilton ed., 1888).

6. *Id.*

7. 285 U.S. 22 (1932). *See also* David P. Currie, *The Constitution in the Supreme Court: The New Deal, 1931-1940*, 54 U. CHI L. REV. 504, 514 (1987) (noting *Crowell* introduced "the most significant relaxation of constitutional obstacles to the modern administrative state").

8. *Crowell*, 285 U.S. at 46.

9. *Id.* at 46-47.

10. JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 8 (1997).

11. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984).

12. *Crowell*, 285 U.S. at 46.

something quite the opposite.[13] Perhaps in response to the tensions between traditional principles of democracy and judicial efficiency, twenty-seven state governments have created centralized offices of administrative hearings. These offices, often called central panels, range in size, scope of authority, and relative relationship to the other branches of their respective state governments. In addition, they provided the cultural texts from which the 2004 Fellowship Symposium drew its lessons.

Featuring scholars and administrative law judges from Maryland, Missouri, North Carolina, Georgia, Ohio, Oregon, Minnesota, South Carolina, and Michigan, the symposium began with an introduction to the history of state central panels by Judge John W. Hardwicke.[14] Noting the similarities between ancient Roman executives and the modern executives in that they both "have a tendency to interpret the law in a way that is favorable to their policy positions,"[15] Judge Hardwicke pointed out practical and jurisprudential concerns weighing in favor of forming central panels at the state level. A presentation entitled, "The Landscape of Administrative Hearings in Indiana," by 2004 Program on Law and State Government Fellow Julie Keen followed Judge Hardwicke's remarks.

The first panel discussion, "Creation and Maintenance of an Office of Administrative Hearings: State Perspectives," featured Christopher Graham,[16] the Hon. Julian Mann,[17] the Hon. Lois F. Oakley,[18] and Professor Christopher McNeil.[19] Describing different state government cultures and central panel histories, each panelist contributed ideas about the creation and evolution of central panel systems and how they work today. Professor Christopher McNeil's article, exploring the executive and administrative branches' use of their

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13. *See* MASHAW, *supra* note 10, at 107 (describing the administrative state as "constitutionally unnecessary" and "governmentally dysfunctional"). Others have noted the "largely undemocratic mechanisms that characterize the modern administrative state." A. Michael Froomkin, *ICANN 2.0: Meet the New Boss*, 36 LOY. L.A. L. REV. 1087, 1087 n.1 (2003). Still others note the problems created by an administrative state they describe as balkanized. *See* Cass Sunstein et al., *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153, 1188 (2002) (discussing "an enterprise as enormous as the national government," and noting that "[t]he administrative state is heavily balkanized, with largely independent institutions engaged in independent tasks"); Thomas E. Ewing, *Oregon's Office of Administrative Hearings: A Postscript*, 24 NAT'L A. ADMIN. L. JUDGES 21, 30 (2004) (describing Oregon's adjudicative system before the introduction of a central panel system).

14. Executive Director, National Association of Administrative Law Judges; Former Chief Administrative Law Judge, Office of Administrative Hearings, Maryland.

15. Judge John W. Hardwicke, Address at the Program on Law and State Government Symposium (Oct. 1, 2004).

16. President, National Association of Administrative Law Judges; Vice Chair, National Conference of Administrative Law Judiciary of the American Bar Association Judicial Division.

17. Chief Administrative Law Judge, Office of Administrative Hearings, North Carolina.

18. Chief Administrative Law Judge, Office of Administrative Hearings, Georgia.

19. Professor of Law, Capital University Law School; Administrative Hearing Examiner, Ohio; Former Chair of the Administrative Law Committee of the Ohio State Bar Association.

adjudicative powers in response to the terrorist attacks of September 11, 2001, is contained in this issue.

The Hon. Justice Frank Sullivan, Jr., Associate Justice of the Indiana Supreme Court, addressed the symposium attendees with remarks entitled, "Central Panels and Judicial Review." Justice Sullivan's article, also included in this issue, continues his response to the question presented by the title of the Symposium, "Should Indiana Consider Creating an Office of Administrative Hearings?" In doing so, Justice Sullivan presents several questions for Indiana to consider in light of the traditional prerogatives of the executive branch and traditional notions of judicial review of administrative action.

The second panel discussion of the day, "Fairness, Funding, and ALJ Finality," featured the Hon. Thomas J. Ewing,[20] the Hon. Bruce H. Johnson,[21] Professor James F. Flanagan,[22] and the Hon. Edward F. Rodgers, II.[23] This panel highlighted different states' approaches to the central panel concept with respect to the procedural due process questions that are inextricably related to questions of government design. Professor Flanagan's article, examining the consequences of providing ALJs with final authority over agency decisions, is also contained within this issue. Program on Law and State Government Fellow Brian Berg concluded the symposium with his presentation, "Policy Choices for Restructuring Indiana's System of Administrative Hearings: Keeping the Status Quo or Moving toward a Central Panel?"

The ineluctable question for all states—those with and without central panels—remains: how fair, fast, and cheap should the executive judiciary be?[24] It is my sincere hope that the pieces presented in this collection reflect the invitation of the 2004 Program on Law and State Government Fellows to look at both the heart and the skin of administrative adjudication—to define its purpose and shape our understanding of its possibilities. The Program on Law and State Government thanks the Indiana Law Review for continuing the dialog between state governments and the academic community by including the symposium pieces in this issue. The Program on Law and State Government also thanks all of those who made scholarly contributions to the 2004 Fellowship Symposium, especially those whose articles are published here. Finally, the Program on Law and State Government celebrates the work of 2004 Fellows, Julie Keen and Brian Berg.

Cynthia Baker,
Director, Program on Law and State Government
October 2004

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20. Chief Administrative Law Judge, Office of Administrative Hearings, Oregon.

21. Assistant Chief Administrative Law Judge, Office of Administrative Hearings, Minnesota.

22. Oliver Ellsworth Professor of Federal Practice, University of South Carolina.

23. Administrative Law Judge and Director of the Commercial, Licensing, and Regulatory Services Division, Bureau of Hearings, Michigan.

24. *See* John M. Greacen, *How Fair, Fast, and Cheap Should Courts Be?*, 82 JUDICATURE 287 (1999).

SOME QUESTIONS TO CONSIDER BEFORE INDIANA CREATES A CENTRALIZED OFFICE OF ADMINISTRATIVE HEARINGS

FRANK SULLIVAN, JR.*

One of the most interesting innovations in administrative law in the last two decades has been the emergence of centralized offices of administrative hearings, often referred to as "central hearing agencies" or "central panels." This Article assumes a general degree of familiarity with the central panel concept on the part of the reader. For purposes of introduction, Professor James F. Flanagan's description suffices:

> A central panel of [administrative law judges (ALJs)] is a cadre of professional adjudicators who are administratively independent of the agencies whose cases they hear, and thus, they are removed from agency influence. The central panels are organized in several ways[: as] . . . an independent agency within the executive branch[; as a] . . . part of another agency for administrative support, but independent for all other purposes[; or with] . . . the ALJs in a separate organization, [assigning] each ALJ to a particular agency based upon expertise in the subject matter. Some panels rotate the agency case assignments of the ALJs.[1]

Professor Flanagan also points out that there is a related development in administrative law of "restricting or eliminating agency review of . . . [ALJ] decisions, thereby making them actually or effectively final and subject only to judicial review."[2]

This Article addresses the question, "Should Indiana consider creating a centralized office of administrative hearings?" Implicit in this inquiry is the notion that administrative law judges are an integral part of the judicial enterprise. And indeed they are. One cannot work in government but for a short time without being enormously impressed with the critical contribution to the people's business performed by administrative law judges. Government could not

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This Article is based on remarks delivered at the Indiana University School of Law—Indianapolis Program on Law and State Government Fellowship Symposium, *Maximizing Judicial Fairness and Efficiency: Should Indiana Consider Creating an Office of Administrative Hearings?*, held in Indianapolis on October 1, 2004. I want to express my appreciation to the Law School; the Law School's Program on Law and State Government and the Program's director, Cynthia Baker; and to the Program Fellows who organized the symposium, Brian Berg and Julie Keen. I also acknowledge with thanks the advice of Judge David F. Hamilton, James M. Verdier, Jon B. Laramore, and Rachel M. McGeever and the assistance of my law clerks, particularly Robert A. Parrish.

1. James F. Flanagan, *Redefining the Role of the State Administrative Law Judge: Central Panels and Their Impact on State ALJ Authority and Standards of Agency Review*, 54 ADMIN. L. REV. 1355, 1356 (2002) (footnotes omitted).

2. *Id.* Flanagan notes that "ALJs support making their decisions more final." *Id.* at 1360 n. 18.

function without them and improving administrative adjudication procedures is one good way to show our appreciation for their efforts.

Administrative law in general and the work of administrative law judges in particular is not an area in which I claim any particular expertise. But though I claim no special expertise in the subject, I do claim keen interest in it. This is for several reasons, some more obvious than others. First, of course, as an appellate judge, I see with some regularity in the course of my work the decisions of administrative law judges. While most of these cases follow the traditional model of judicial review of administrative decisions, several of our cases have had fact patterns if not issues relevant to the topic of this symposium.

One particular decision of our court eight years ago—authored by our Chief Justice—discussed the central panels movement and even cited an article by Judge John W. Hardwicke, one of the early leaders of the movement.[3] And our state does have, in its environmental management agency, an administrative adjudication office the decisions of which are subject to judicial review without agency intermediation.[4] Our court this year has rendered two decisions in appeals from that office.[5] And so the work of administrative law judges provides some of the subject matter of my own appellate work.

Second, prior to appointment to our court, I worked in the executive branch of state government as Governor Evan Bayh's State Budget Director. One of the great things about being budget director is that you have your hand in virtually every aspect of state government because all issues are budget issues. As a consequence of having to know quite a bit about the internal workings of the Family and Social Services Administration, Department of Natural Resources, Utility Regulatory Commission, Alcoholic Beverage Commission and the like, I came to understand the integral role that administrative law judges play in the business of each of those agencies.

Third, and this brings me closest to the principal thrust of this Article, the way in which government is organized to do the people's business, both as a matter of constitutional theory and as a practical matter, is something that has long interested me. As such, I am immediately drawn to examining the relationship to constitutional order and the practical effect of any innovation in the way in which government does its business—and "central panels" are certainly a significant and noteworthy innovation.

In terms of constitutional theory, the way in which government is organized to do the people's business implicates the constellation of issues that fall under

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3. Peabody Coal Co. v. Ind. Dep't of Natural Res., 664 N.E.2d 1171, 1174 (Ind. 1996) (citing Hon. John W. Hardwicke, *The Central Hearing Agency: Theory and Implementation in Maryland*, 14 J. NAT'L ASS'N OF ADMIN. L. JUDGES 5 (1994)).

4. *See* Hon. Lori Kyle Endris & Hon. Wayne E. Penrod, *Judicial Independence in Administrative Adjudication: Indiana's Environmental Solution*, 12 ST. JOHN'S J. LEGAL COMMENT. 125, 126-27 (1996) (describing Indiana's efforts to create an office of hearings to adjudicate environmental matters).

5. *See* Huffman v. Ind. Office of Envtl. Adjudication, 811 N.E.2d 806 (Ind. 2004); Breitweiser v. Ind. Office of Envtl. Adjudication, 810 N.E.2d 699 (Ind. 2004).

the rubric of separation of powers or, to use Indiana constitutional terminology, separation of functions.[6] In terms of practical effect, the way in which government is organized to do the people's business is a question of performance—how well does government do what it is supposed to do?

It seems to me that the U.S. Supreme Court has been relatively absolutist on separation of powers questions in recent years. It has found in the Constitution bright and immutable boundary lines between the three branches of government. And it has struck down enactments or arrangements that appeared to it to transgress these boundaries.[7] A couple of well-known examples illustrate this point. In the first, Congress and the President had worked out an arrangement whereby executive branch regulations implementing statutes passed by Congress would be subject to disapproval by one—but only one—House of Congress. In the famous *Chadha* case, the Supreme Court held that this arrangement violated separation of powers.[8] The second example is the so-called "line-item veto" of particular appropriations in the federal budget. Congress and the President agreed that the President should have this authority but again, in *Clinton v. City of New York*,[9] the Supreme Court found a violation of separation of powers.[10]

I have been skeptical about decisions like *Chadha* and *Clinton*. If the two political branches of the government, fully accountable to the voters, want to experiment a little bit with the boundaries between their two branches, the courts should be reluctant to intervene.[11] After all, if the voters do not like the experiment, they can say so at the next election.[12] And if Congress and the President conclude that they do not like the arrangement, a simple act of Congress can restore the status quo ante.[13]

Given my skepticism of courts policing for constitutionality government innovations agreed to by the political branches, I do not question the

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6. *See* Buckley v. Valeo, 424 U.S. 1, 112-41 (1976) (discussing the constitutional principle of separation of powers). *See also* IND. CONST. of 1851, art. III, § 1.

7. *See* Clinton v. City of New York, 524 U.S. 417, 449 (1998); INS v. Chadha, 462 U.S. 919, 922 (1983).

8. 462 U.S. at 922.

9. 524 U.S. at 419.

10. I acknowledge that the Supreme Court did not take an absolutist position on the separation of powers question of the constitutional boundary between the executive and judicial branches in *Morrison v. Olsen*, 487 U.S. 654, 696-97 (1988) (discussing "independent counsel" statute). *But see* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982) (finding a separation of powers violation in the Bankruptcy Act of 1978's grant of jurisdiction to bankruptcy judges to decide contract claims arising under state law).

11. *See* Bowsher v. Synar, 478 U.S. 714, 776 (1986) (White, J., dissenting) (Congress and the Executive Branch should be permitted to negotiate the boundaries of their authority with only limited judicial oversight); *Northern Pipeline*, 458 U.S. at 113 (White, J., dissenting) ("[Article III] . . . should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities").

12. *Bowsher*, 478 U.S. at 776 (White, J., dissenting).

13. *Id.*

constitutionality of central panels. Indeed, I express no view at all on their constitutionality.

Central panels are an extremely interesting and, judging by the number of jurisdictions that have embraced them, popular innovation.[14] Many credit central panels with better allocation of state agency resources, producing greater efficiency in administrative adjudication, considerable savings of money to the state, and also producing more systematic and uniform agency decisionmaking.[15] Others praise central panels with increasing the level of professionalism among administrative law judges, producing codes of ethics and standards of conduct for hearings and decisions.[16]

Perhaps the most persuasive argument made on behalf of central panels is that they increase public confidence in administrative adjudication.[17] Illinois Administrative Law Judge Ed Schoenbaum, one of the leaders of the central panels movement, has written "many people believe that [ALJs] who are not in a central hearing agency are biased in their adjudicative responsibilities . . . [because the] ALJs are hired, promoted, supervised, and paid by the very agency for whom [they] are [reviewing]."[18] The perceived conflict arises because an ALJ must decide whether the challenged decisions are correct and "[t]he public thinks this is unfair."[19]

Under central panels, persons challenging an agency decision in an administrative proceeding no longer face the perception that their adversary in the proceeding is also the judge. Rather, such persons now appear before an administrative bench unbiased toward and detached from agency or executive influence.[20]

But I do want to raise some questions related to separation of powers and the

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14. To date, twenty-six states have established administrative central panels. *See* Jim Rossi, *Final, But Often Fallible: Recognizing Problems with ALJ Finality*, 56 ADMIN. L. REV. 53, 57 n.6 (2004).

15. *See* Thomas E. Ewing, *Oregon's Hearing Officer Panel*, 23 J. NAT'L ASS'N. ADMIN. L. JUDGES 57 (2003) (detailing the increased efficiency effectuated by adopting a central panel in Oregon); Flanagan, *supra* note 1, at 1383 (noting that central panels often render better decisions than those adjudicators employed by a single agency); Christopher B. McNeil, *Similarities and Differences Between Judges in the Judicial Branch and the Executive Branch: The Further Evolution of Executive Adjudication Under the Administrative Central Panel*, 18 J. NAT'L ASS'N. ADMIN. L. JUDGES 1 (1998) (advocating for the adoption of central panel systems for administrative adjudication); Karen Y. Kauper, Note, *Protecting the Independence of Administrative Law Judges: A Model Administrative Law Judges Corps Statute*, 18 U. MICH. J.L. REFORM 537, 543 (1985) (applauding the benefits of the central panel paradigm).

16. *Supra* note 15.

17. *Supra* note 15.

18. Hon. Edward J. Schoenbaum, *Improving Public Trust & Confidence in Administrative Adjudication: What Administrative Law Practitioners, Judges, and Academicians Can Do*, 53 ADMIN. L. REV. 575, 579 (2001).

19. *Id.*

20. *See supra* note 15.

performance of government that I think proponents of central panels need to be prepared to answer in advocating their adoption. I raise these, to repeat, not as constitutional questions but as policy questions that I think should be asked and need to be answered to the satisfaction of legislators considering the adoption of a central panels regime.

For purposes of my discussion of these questions, I assume that the central panels legislation under consideration has the following characteristics:

(1) Administrative law judges work in a central agency, separate and apart from the agencies with respect to which they adjudicate disputes.

(2) These ALJs are hired, supervised, compensated, and assigned cases in a manner not influenced by the agencies.

(3) The decisions of these ALJs are final decisions, subject only to judicial branch review.

I recognize that some of these characteristics, especially with respect to finality, do not exist in all central panel arrangements but these do seem to be the attributes preferred by advocates of central panels[21] and so I will proceed on this basis. And I will, at the end of this Article, examine the impact on my analysis of relaxing the finality characteristic.

I. QUESTION #1: ARE CENTRAL PANELS INCONSISTENT WITH THE TRADITIONAL PREROGATIVES OF THE EXECUTIVE BRANCH?

My first set of concerns is that central panels may be inconsistent with the traditional prerogatives of the executive branch. Let me start here by making a point with particular emphasis. I wholeheartedly and without qualification agree that the executive has a legal, indeed constitutional, indeed moral, obligation to execute faithfully the laws of the jurisdiction. I imply no suggestion that any executive branch official including, in particular, any administrative law judge, should at any time act contrary to the requirements of law.

But the nature of our government is that, within the parameters defined by law, the executive branch has latitude—sometimes considerable latitude—with which and in which to act. One example of this is in the setting of priorities. The legislature may dictate a range of responsibilities for the executive branch but leave it to the executive to prioritize the order and emphasis given to those priorities. Another example is in the setting of substantive policy. The legislature may dictate overall objectives but leave it to the executive to develop the policies necessary to achieve those objectives. Still a third example is in the development of new programs. The executive oftentimes has leeway to promulgate entirely new initiatives via executive order without any direction from the legislature whatsoever.

One of the inconsistencies between the use of central panels and prerogatives of the executive branch, it seems to me, is that it reduces the ability of the executive branch to set its own priorities. Let me give you an example. In our state, a new reassessment of the value of real property has, combined with other

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21. *See* Flanagan, *supra* note 1, at 1356 (discussing finality); Kauper, *supra* note 15.

factors, caused substantial increases in the property tax bills of many homeowners. There is a procedure for appealing such increases that utilizes administrative law judges.[22] The current state administration has announced a plan to increase substantially the number of administrative law judges handling property tax appeals.[23] This reflects the priority that this administration is giving to this particular matter.

Under a central panels approach, it seems to me that the governor might not have this flexibility. Cases could be assigned and ALJs allocated based on priorities established by the head of the central hearing agency,[24] not by the governor or an agency head.[25] But it seems to me that the executive branch might well want to retain the authority to decide that, and allocate resources to permit, certain types of cases to be handled on a priority basis.

A more important inconsistency between the use of central panels and the prerogatives of the executive branch, it seems to me, is that central panels can interfere with the executive's ability to set policy. It is for this reason, of course, that many advocates of central panels argue for them most forcefully.[26] The contention is that administrative law judges are neutral adjudicators and for them to do their duty properly, they must be independent of the policy-driven influences of the agencies with respect to which they adjudicate disputes.[27]

This is a highly nuanced subject. I trust the foregoing discussion shows the high degree of respect I hold for the work of administrative law judges as adjudicators, and that I recognize that ALJs play a distinct role in resolving disputes between agencies and those who challenge agency decisions. But I also think that the nature of many administrative adjudications cannot help but have policy-making implications. The following excerpt from a recent article by Professor Jim Rossi makes my point:

> Not all policy judgments are of the sort that evidence alone can resolve;

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22. IND. CODE § 6-1.1-4-34 (2004).

23. *See* Petition for Writ of Mandamus and Prohibition, Exhibit C at 1-2, State *ex rel.* Atty. Gen. v. Lake Superior Court, 820 N.E.2d 1240 (Ind.) (No. 45D06-0505-PL-91), *reh'g denied*, 2005 Ind. LEXIS 239 (Ind. Mar. 15, 2005) (noting the Indiana Board of Tax Review's plan to supplement its fifteen administrative law judges and board members with five special masters to help adjudicate the additional tax appeals).

24. *See* MODEL ACT CREATING A STATE CENTRAL HEARING AGENCY § 1-5(a)(3), *reprinted in* National Administrative Law Judge Foundation, 17 J. NAT'L ASS'N ADMIN. L. JUDGES 313 (1997) [hereinafter MODEL ACT].

25. Karen Y. Kauper has argued that one of the advantages of the central panel system is that ALJs would hear cases as they arise. Kauper, *supra* note 15, at 547-48. I infer from this that advocates of central panels consider it inappropriate for the governor or an agency head to be free to determine that some cases are more important or need more expedited attention than others.

26. *See* R. Terrence Harders, *Striking a Balance: Administrative Law Judge Independence and Accountability*, 19 J. NAT'L ASS'N ADMIN. L. JUDGES 1, 4 (1999); Kauper, *supra* note 15, at 549-50.

27. *See supra* note 15.

> some are judgments that will depend for their legitimacy on a degree of political accountability. In addition, broader policy and regulatory goals may be implemented by an individualized policy judgment, so it will often be important to evaluate the relationship between the individual decision and the agency's other programs. Telling the difference between an issue of fact and an issue of policy is not always straightforward . . . .[28]

Here are a couple of examples of what I am talking about. Professor Rossi points to a Florida case in which an electrical utility sought a permit from the state environmental protection agency to construct power transmission lines across protected wetlands.[29] The governing statute authorized the agency to balance a variety of factors in the course of deciding whether the permit would be "in the public interest."[30] The proposed project would have destroyed forested wetlands by clear cutting of the trees but the habitat of plants and animals dependent on herbaceous wetlands would have been expanded.[31] The administrative law judge analyzed this trade-off and found that there would be no net adverse impact from the project and that it was in the public interest.[32] The ALJ recommended issuing the permit.[33] The agency rejected the ALJ recommendation, weighing the adverse impact of the clear-cutting of trees more heavily than the ALJ and concluding the permit was not in the public interest.[34]

My second example is more hypothetical. One could well imagine a tavern licensing régime in which the licensing agency was entitled to balance the economic and other benefits of awarding a license with any negative impact on the surrounding community in its decision. The licensing agency, perhaps on direction from the governor, might adopt a policy consistent with the statute to give considerable weight to the position of local community leaders in assessing impact on the surrounding community. To what extent is an administrative law judge reviewing a challenge to a decision denying a tavern license free to disregard the views of the local mayor and city council members on the permit application?

I think that executive branch officials might well be concerned that central panels will create a situation in which the legitimate—that is, the fully authorized by law—policy objectives of the administration will not be taken into account during administrative adjudication: that a wetlands permit, which an environmental protection agency's policy would deny, would instead be granted; or that a tavern license, which an alcoholic beverage commission's policy would

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28. *See* Rossi, *supra* note 14, at 70.

29. *See* Fla. Power Corp. v. State Dep't of Envtl. Prot., 638 So. 2d 545, 547 (Fla. Dist. Ct. App. 1994).

30. *Id.* at 548.

31. *Id.* at 546.

32. *Id.*

33. *Id.* at 556.

34. *Id.* at 561.

grant, would otherwise be denied.

Again to quote Professor Rossi:

> From an accountability perspective, allowing a central panel ALJ to trump the agency on such an issue is problematic. Central panel ALJs often operate within the executive branch, but they are generally non-political. Unlike the agency, which has substantive regulatory jurisdiction, the central panel has not been delegated the authority to regulate in a specialized area. Agency heads, unlike most ALJs, are political appointees, accountable (through appointments and removal, as well as budgetary oversight) to the executive branch and—perhaps to a lesser, but no less important degree—the legislature (which writes and amends regulatory statutes). The political accountability of agency heads is important to ensuring the public legitimacy of agency action.[35]

Professor Flanagan has written in a similar vein:

> While administrative agencies are politically accountable through the appointment of their leadership, the authority of the chief executive, and the power of the legislative purse, central panels are not politically accountable in this sense. Neither the central panel nor the individual ALJ is responsible for the general enforcement of the statutory scheme, the orderly development of a regulatory effort, or the future consequences of a decision in situations yet to occur.[36]

II. Question #2: Are Central Panels Inconsistent with the Traditional Notions of Judicial Review of Administrative Action?

Thus far I have discussed questions generated by the inconsistency of central panels with traditional prerogatives of the executive branch. I think questions are also generated by the inconsistency of central panels with traditional notions of judicial review of administrative action.

Trial and appellate judges show great deference to the decisions of administrative agencies. In an opinion for our court, I wrote that

> The standard of review of an administrative agency decision is narrow. An agency decision may be reversed by an appellate court only where it is purely arbitrary, or an error of law has been made. An action of an administrative agency is arbitrary and capricious only where there is no reasonable basis for the action.[37]

As I have thought about administrative law during my judicial career, I have always thought that there are two distinct reasons for this deference. One, more

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35. Rossi, *supra* note 14, at 71.

36. Flanagan, *supra* note 1, at 1409.

37. Ind. Civil Rights Comm'n v. Delaware County Circuit Court, 668 N.E.2d 1219, 1221 (Ind. 1996) (citations omitted).

frequently cited, is agency expertise.[38] The second is separation of powers. Not only is the agency substantively expert, it is also the entity charged under the constitutional order with carrying out the matter at issue—it is the entity under the Constitution with primacy for executing policy on that subject.[39]

One of the arguments made with particular force by the advocates of central panels is that having administrative law judges who are generalists, rather than subject matter experts, will enhance the quality of administrative adjudication.[40] But one of the obvious implications of replacing specialists with generalists is that one of the two bases for judicial deference to administrative agency decisions—expertise—is, by definition, diminished. We have seen already that removing policy considerations from administrative adjudications strips those decisions of the separation of powers justification for deference: they are no longer the decisions of the entity under the Constitution with primacy for executing policy on that subject. Indeed, does the exhaustion doctrine—that a party must exhaust administrative remedies before seeking judicial review—have the same vitality under central panels if there is a non-deferential standard of review? Without a deferential standard of review I think the very legitimacy conferred on administrative law judge decisions by virtue of those judges being accountable within the executive branch is arguably removed.

Professor Flanagan has written about still a third reason for traditional deference. He points out that decisions coming from a single agency will have the additional virtue of consistency. But, he points out, central panels mean "multiple final decisionmakers and decisional variance because, without agency review, there is no method of insuring that the various ALJ decisions are consistent."[41]

III. QUESTION #3: CAN THESE QUESTIONS BE RESOLVED BY CHANGES TO THE WAY IN WHICH ALJ DECISIONS ARE REVIEWED?

My model of a central panel arrangement has assumed that the decision of the central panel ALJ is final, subject only to judicial review. Much of my critique has focused on the effects of such finality and it is therefore fair to ask whether the questions I raise can be resolved either by subjecting ALJ decisions to agency

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38. *See* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 652 (1990) (citing Chevron, U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 865 (1984)).

39. *Chevron*, 467 U.S. at 866 ("When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, . . . the challenge must fail. . . . The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'") (citing TVA v. Hill, 437 U.S. 153, 195 (1978)). *But see* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515 (1989) (rejecting separation of powers as a justification for *Chevron* deference).

40. *See supra* note 15.

41. *See* Flanagan, *supra* note 1, at 1389.

review, i.e., making them not final, or subjecting them to heightened judicial scrutiny, i.e., not affording them the deference historically given administrative agency decisions.

There is considerable variation among central panel arrangements in whether or not an ALJ's decision is final, subject only to judicial review. Professor Flanagan points out, in the course of detailing the evolution of central panel ALJ authority as to finality, that "until recently, . . . state agencies . . . had virtually unrestricted powers to review and modify the ALJ's findings."[42] Professor McNeil points out that the Model Act Creating A State Central Hearing Agency devised by the National Association of Administrative Law Judges[43] provides various options for agency review of ALJ decisions.[44]

I acknowledge that if a central panel ALJ's decision is subject to review by the agency prior to judicial review, some of my concerns about inconsistency and prerogatives of the executive are alleviated—but not entirely eliminated. I say this for two reasons. First, the acquiescence to agency review of central panel ALJ decisions is often accompanied by restrictions on the extent of that review, e.g., providing that "the decision of an ALJ is presumptively correct and an agency can set aside only those decisions not supported by substantial evidence."[45] To the extent agency review is restricted in this or similar ways, the concerns raised above are implicated.

Second, it may be inherent in central panel adjudication that the legitimate—fully authorized by law—policy objectives of the executive branch will not be taken into account during administrative adjudication. At least in complicated cases with mixed issues of law and fact, it seems to me highly desirable to have agency policy incorporated in the adjudication, rather than leaving it to agency review to impose (retroactively) policy considerations: it would be more efficient to incorporate policy considerations earlier in the process; and it would reduce the number of reversals.

Professors Flanagan and Rossi have both documented the growing trend to restrict or eliminate agency review of central panel ALJ decisions.[46] (In Indiana, the decision of an ALJ in our Office of Environmental Adjudication is final, subject only to judicial review.)[47] Professor Rossi proposes a solution to a set of concerns similar to those I express above about the inconsistency between central panels and traditional notions of judicial review of administrative action. He argues that the political accountability of agency decisionmaking can be protected by adjusting the standard of judicial review given central panel ALJ decisions. Rather than deferring to the decision of the central panel ALJ when it diverges from the position of the agency, Rossi proposes that courts "should defer to the

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42. *Id.* at 1364-65.

43. *See* MODEL ACT, *supra* note 21, at 316.

44. McNeil, *supra* note 15, at 28.

45. Kauper, *supra* note 15, at 561 n.128 (citing as examples Colorado, Florida, and Massachusetts).

46. Flanagan, *supra* note 1; Rossi, *supra* note 14.

47. IND. CODE § 4-21.5-7-5 (2004).

politically accountable decision-maker except where the issue is one of fact depending on the credibility of witnesses and other evidence."[48]

A case raising just this issue made its way through the Indiana courts a few years ago.[49] Under the Indiana Surface Mining Control and Reclamation Act, an ALJ in the Indiana Department of Natural Resources (DNR) has final decision-making authority, subject only to judicial review, in cases involving alleged violations of surface mining regulations.[50] An ALJ exonerated a coal mining company of charges that the company was in violation of certain regulations concerning drainage of surface water.[51] The DNR director appealed the ALJ's decision and the trial court held in favor of the director.[52] On appeal, the coal mining company argued that the trial court had not given proper deference to the decision of the ALJ.[53] Without explicitly indicating that it was giving deference to the position of the DNR director, the court of appeals affirmed the trial court, holding that the ALJ's decision had been "arbitrary, capricious, and contrary to law."[54]

Rossi's approach satisfies some of my concerns about the inconsistency between central panels and traditional notions of judicial review of administrative action. But here, too, I have several lingering apprehensions. First, it seems inefficient for courts to have to deal with conflicting positions of two executive branch entities.[55] Second, it creates an extremely awkward position for the agency in situations where the agency concurs in the result of the central panel ALJ but not in the judge's reasoning. To elaborate, suppose that in the surface mining case just described, the ALJ had ruled against the coal mining company but used an interpretation of the governing statute and regulations that the department believed wrong and problematic for future cases. Should the director seek judicial review in that circumstance? And suppose the coal mining company sought review. The DNR would be faced with the very real possibility that binding judicial precedent would be established as to the interpretation and

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48. Rossi, *supra* note 14, at 75.

49. Peabody Coal Co. v. Ind. Dep't of Natural Res., 629 N.E.2d 925, 929 (Ind. Ct. App. 1994) ("Peabody I"), *aff'd*, 664 N.E.2d 1171, 1174 (Ind. 1996) ("Peabody II").

50. *Peabody II*, 664 N.E.2d at 1173.

51. *Id.* at 1172.

52. *Peabody I*, 629 N.E.2d at 928.

53. *Id.* at 930.

54. *Id.* at 931. The coal mining company also contended that the DNR director was not entitled himself to petition for judicial review under the Surface Mining Act. We took jurisdiction of the case to address solely that issue and, like the court of appeals, we resolved it against the company. *Peabody II*, 664 N.E.2d at 1174. We affirmed the decision of the court of appeals in all other respects as well. *Id.*

55. Rossi notes that Maine has dealt with this problem by establishing its central panel within the judicial branch itself as an "administrative court." Rossi, *supra* note 14, at 12 n.34 (citing ME. REV. STAT. ANN. tit. 5, § 1151 (West 1964); ME. REV. STAT. ANN. tit. 4, § 1151 (West 1964); Richard G. Sawyer, Comment, *The Quest for Justice in Maine Administrative Procedure: The Administrative Code in Application and Theory*, 18 ME. L. REV. 218, 224-25, 241-43 (1966)).

application of agency regulations for the agency in a case in which the agency is not even a party.

CONCLUSION

I think there is a lot to be said for the goals of central panels, not the least of which is the more tangible recognition that they give to the enormously important role played by administrative law judges in our system of government today. And I express no opinion on the constitutionality of such arrangements. I do think, from the standpoint of selling the concept to executive and legislative decisionmakers, however, that central panels raise some concerns. Those who make the case for central panels need to consider the inconsistencies between central panels and traditional prerogatives of the executive branch and inconsistencies between central panels and traditional notions of judicial review of administrative action. If these inconsistencies can be reconciled, it may very well be that Indiana will create an office of administrative hearings.

AN UPDATE ON DEVELOPMENTS IN CENTRAL PANELS AND ALJ FINAL ORDER AUTHORITY

JAMES F. FLANAGAN*

I. THE STATE OF THE CENTRAL PANEL MOVEMENT

States are in the vanguard of a two-pronged revolution in administrative law. The first is the creation of central panels which separate ALJs institutionally from the agencies whose cases they hear.[1] The second is a challenge to a fundamental premise of administrative adjudication—the agency's power to review the findings of the ALJ. Some states are providing ALJs with de jure or de facto authority to make the final agency decision, subject only to judicial review.[2] These developments are related only in the sense that the introduction

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1. There is a substantial body of work on central panels. Malcolm C. Rich and Wayne E. Brucer's *The Central Panel System for Administrative Law Judges: A Survey of Seven States* is the original study of central panels. MALCOLM C. RICH & WAYNE E. BRUCAR, THE CENTRAL PANEL SYSTEM FOR ADMINISTRATIVE LAW JUDGES: A SURVEY OF SEVEN STATES (1983) (surveying California, Colorado, Florida, Massachusetts, Minnesota, New Jersey, and Tennessee). *See generally* Jay S. Bybee, *Agency Expertise, ALJ Independence, and Administrative Courts: The Recent Changes in Louisiana's Administrative Procedure Act*, 59 LA. L. REV. 431 (1999); Charles E. Daye, *Powers of Administrative Law Judges, Agencies, and Courts: An Analytical and Empirical Assessment*, 79 N.C. L. REV. 1571, 1583-84 (2001); Thomas E. Ewing, *Oregon's Hearing Officer Panel*, 23 NAT'L ASS'N ADMIN. L. JUDGES 57 (2003); Hon. John W. Hardwicke, *The Central Panel Movement: A Work in Progress*, 53 ADMIN. L. REV. 419 (2001); David W. Heynderickx, *Finding Middle Ground: Oregon Experiments with a Central Hearing Panel for Contested Case Proceedings*, 36 WILLAMETTE L. REV. 219 (2000); Allen C. Hoberg, *Administrative Hearings: State Central Panels in the 1990s*, 46 ADMIN. L. REV. 75, 78-90 (1994); Allen C. Hoberg, *Ten Years Later: The Progress of State Central Panels*, 21 J. NAT'L ASS'N ADMIN. L. JUDGES 235 (2001); Bruce H. Johnson, *Methods of Funding Central Panels: The Fiscal, Management, and Policy Implications*, 20 J. NAT'L ASS'N ADMIN. L. JUDGES 301 (2000); Jeff S. Masin, *New Jersey's Office of Administrative Law: The Importance of Initial Choices*, 23 J. NAT'L ADMIN. L. JUDGES 387 (2003); Christopher B. McNeil, *The Model Act Creating a State Central Hearing Agency: Promises, Practical Problems, and a Proposal for Change*, 53 ADMIN. L. REV. 475 (2001); William B. Swent, *South Carolina's ALJ: Central Panel, Administrative Court, or a Little of Both?*, 48 S.C. L. REV. 1 (1996); *Recent Developments State Administrative Law Symposium*, 53 ADMIN. L. REV. 395 (2001) (several articles on central panels).

2. Some commentators have noted the trend toward restricting agency review. *See* Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 29 ADMIN. & REG. L. NEWS 2 (Spring 2004); Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN. L. REV. 551, 569-72 (2001) [hereinafter Rossi, *Overcoming Parochialism*]; Jim Rossi, *Final Orders on Appeal: Balancing Independence With Accountability*, 19 J. NAT'L ASS'N ADMIN. L. JUDGES 1, 3-10 (1999) [hereinafter Rossi, *Final Orders on Appeal*]; F. Scott McCown

of central panels has led to the issue of ALJ finality, while ALJ finality is neither inherent in, nor compelled by, the concept of centralizing ALJs in an independent agency. Central panels are an important innovation in state administrative procedure and are an effective, efficient method of providing administrative adjudication. The justifications for central panels, in terms of efficiency, cost savings, encouraging ALJ education and professionalism, and promoting a perception of fairness, however, do not address the key issue in ALJ finality: whether the agency or the ALJ is the appropriate final decision maker. My view is that the agency should be the final decision maker. The legislature has delegated this authority to the agency which has the knowledge and expertise to properly conduct agency review of ALJ decisions. In addition, I believe that ALJ finality has significant disadvantages. In particular, it creates a loss of political accountability for the decisions reached through administrative adjudication, and also adversely affects the agency's ability to develop and implement a consistent regulatory scheme.[3]

This is an appropriate time to review and update recent developments in central panels. Central panels have existed for almost sixty years, with eleven states adopting them since 1990.[4] A Model Act provides framework for implementing a central panel,[5] and there is a significant body of research and commentary on many aspects of central panels. Several broad themes can be observed.

First, central panels have proven themselves. No state that has adopted a central panel has returned to its previous practice. Furthermore, central panels in most states have gained jurisdiction through legislation or agreements with agencies. States also are taking advantage of the concept of central panels by consolidating adjudication services though executive action, rather than legislation.

Second, the experiences of individual states and their central panels provide

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& Monica Leo, *When Can an Agency Change the Findings or Conclusions of an Administrative Law Judge?*, 50 BAYLOR L. REV. 65, 66-67 (1998).

3. James F. Flanagan, *Redefining the Role of the State Administrative Law Judge: Central Panels and Their Impact on State ALJ Authority and Standards of Agency Review*, 54 ADMIN. L. REV. 1355 (2002). A major study of federal administrative adjudication concluded that "[c]onferring a high degree of finality on ALJ findings of fact is virtually certain to create interdecisional inconsistency, costly and time-consuming battles for institutional hegemony, and policymaking cacophony." Paul R. Verkuil et al., *Report for Recommendation 92-7, The Federal Administrative Judiciary*, *in* 2 ADMIN. CONF. OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 1040 (1992).

4. ALA. CODE § 41-22-16 (2000); ARIZ. REV. STAT. ANN. § 41-1092.08 (West 1999 & Supp. 2001); GA. CODE ANN. § 50-13-17(b) (1998); KAN. STAT. ANN. § 77-527,121 (1998 & Supp. 2001); LA. REV. STAT. ANN. § 49:991-997 (West 2001); N.D. CENT. CODE §§ 28-32-13, 28-32-14 (1991); OR. REV. STAT. § 183.470 (2001); S.C. CODE ANN. § 1-23-500 (Law. Co-op. 2003); WYO. STAT. ANN. § 9-2-2201 (Michie 2001).

5. *See* McNeil, *supra* note 1, at 541-49 (reprinting THE MODEL ACT CREATING A STATE CENTRAL HEARING AGENCY (1997)).

insight into many issues. For example, the Louisiana Supreme Court recently addressed the constitutionality of two statutes that significantly affect an agency litigating before its central panel.[6] First, an ALJ has the authority to make a final decision without any agency review.[7] Second, an agency cannot appeal any ALJ's final decision.[8] The facts of the case, and the court's analysis of these statutes in the context of claims that they violated the doctrine of separation of powers, is important to all central panel states.

Third, the debate over ALJ finality has moved to a more sophisticated level as experience has been gained with this issue. This Article probes some of the arguments in favor of ALJ finality, including the need for ALJ independence, the claims that agencies misuse their review powers, and the need to address litigant dissatisfaction with administrative adjudication. In my opinion, neither ALJ independence nor the central panel concept requires ALJ finality. Data from an extensive study in North Carolina indicates that agency review is not being abused, nor will ALJ finality cure litigant dissatisfaction.[9]

Finally, proposals have been advanced to address some of the adverse consequences of ALJ finality. Some suggest that the agency should present its policies during the contested case to ensure that ALJs act in conformity with it.[10] Professor Jim Rossi's proposal argues that enhanced standards of appellate review may restore the agency accountability that is lost when the ALJ makes the final decision.[11] Arguably, neither proposal overcomes the defects of ALJ final order authority. There are significant problems in formulating policy during a contested case. Likewise, there are significant limits on the judiciary's ability, on review, to guide the development of agency policy.

II. THE GROWING ACCEPTANCE OF CENTRAL PANELS

The growth of central panels has been described as the most significant development in administrative law,[12] and the number of panels created by cities and states in the past few years is a tribute to their success. Twenty-five states,[13]

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6. Wooley v. State Farm Fire & Cas. Ins. Co., 893 So. 2d 746, (La. 2005). *See infra* notes 62-86 and accompanying text.

7. LA. REV. STAT. ANN. § 49:992(A)(2).

8. *Id.* § 49:992(B)(3).

9. Daye, *supra* note 1.

10. The view that agencies can present policy during a contested case was rased during a panel discussion on ALJ finality at the 2003 Central Panel Directors Conference, Savannah, Georgia, September 19, 2003, in which the author participated. *See also* Hardwicke, *supra* note 1, at 437 (suggesting that policy be blended into the hearing process).

11. Jim Rossi, *Final, But Often Fallible: Recognizing Problems with ALJ Finality*, 56 ADMIN. L. REV. 53, 64-66 (2004) [hereinafter Rossi, *Problems with ALJ Finally*].

12. Michael Asimow, *The Fourth Reform: Introduction to the Administrative Law Review Symposium on State Administrative Law*, 53 ADMIN. L. REV. 395, 396-99 (2001).

13. Several states have central panels of ALJs as of January 1, 2002. *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-1092.01 (West 1999) (establishing an office of administrative hearings); CAL.

and three major cities,[14] have established central panels thus far. Several other states have considered, but not yet adopted, central panels.[15] Once established, they have proven popular. No state with a central panel has returned to its former

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GOV'T CODE § 11370.2 (West 1992) (stating that office of administrative hearings is under direction of one director appointed by governor); COLO. REV. STAT. § 24-30-1001 (2001) (creating a division of administrative hearings in department of personnel); FLA. STAT. ANN. § 120.65 (West 2002) (creating Division of Administrative Hearings within Department of Management); GA. CODE ANN. § 50-13-40 (1998) (creating an independent administrative hearings agency within the executive branch); IOWA CODE ANN. § 10A.801 (West 2000) (creating Division of Administrative Hearings); KAN. STAT. ANN. § 75-37,121 (1997 & Supp. 2001) (creating office of administrative hearings); LA. REV. STAT. ANN. § 49:991-997 (West 2002) (creating division of administrative law); MD. CODE ANN., STATE GOV'T § 9-1602 (1999) (establishing office of administrative hearings as independent unit of executive branch); MASS. GEN. LAWS ch. 7, § 4H (1998) (creating a division of administrative appeals); MICH. COMP. LAWS § 445.2001 (2001) (merging Michigan Departments of Commerce and Labor to create Department of Consumer and Industry Services, and creating a central panel of ALJs by executive order); MINN. STAT. ANN. § 14.48 (West 1997) (creating administrative hearings office headed by chief ALJ appointed by governor); MO. ANN. STAT. §§ 621.015-.205 (West 2000) (creating an administrative hearing commission); N.J. STAT. ANN. §§ 52:14F-1-:14F-13 (West 2001) (establishing Office of Administrative Law and its duties); N.C. GEN. STAT. § 7A-750 (2001) (creating an independent, quasi-judicial office of administrative hearings); N.D. CENT. CODE § 54-57-01 (2001) (establishing and defining office of administrative hearings); OR. REV. STAT. § 183.605 (2003) (establishing hearing officer panel); S.C. CODE ANN. § 1-23-500 (Law. Co-op. Supp. 2001) (creating ALJ division); S.D. CODIFIED LAWS § 1-26D-1 (Michie Supp. 2002) (establishing an Office of Hearing Examiners); TENN. CODE. ANN. § 4-5-321(a)(2) (1998) (creating the administrative procedures division); TEX. GOV'T CODE ANN. § 2003.021 (Vernon 2000 & Supp. 2002) (defining state office of administrative hearings); VA. CODE ANN. § 2.2-4024 (Michie 2001 & Supp. 2002) (establishing that Executive Secretary of Supreme Court maintains list of hearing officers to be appointed for formal hearings); WASH. REV. CODE ANN. § 34.12.010 (West 1990) (creating an office of administrative hearings); WIS. STAT. ANN. § 227.43 (West 2001) (providing duties of administrator of division of hearings); WYO. STAT. ANN. § 9-2-2201 (Michie 1995) (creating office of administrative hearings as a separate agency); State of Alabama, Office of the Attorney General, *An Overview of Divisions in the Attorney General's Office*, *at* http://www.ago.state. al.us/about_divisions.cfm (last visited Mar. 18, 2005) (describing Administrative Hearings Division in Alabama Attorney General's Office).

14. *E.g.*, D.C. CODE ANN. § 2-1831 (2001 & Supp. 2002) (enacting Office of Administrative Hearings Establishment Act); CHICAGO, ILL., CODE art. I, § 2-14-010 (2003) (establishing Department of Administrative Hearings); NEW YORK CITY, N.Y., CHARTER CODE ch. 45-A, § 1048 (2001) (creating Office of Administrative Trials and Hearings).

15. The legislatures of Hawaii, Illinois, Mississippi, and New York have considered a central panel but have not enacted legislation. *See* S.B. No. 1252, 20th Leg. (Hi. 1999); S.B. No. 561, 92d Gen. Assem. (Ill. 2001); H.B. No. 930, Reg. Sess., (Miss. 2000); Assem. B. No. 662, 224th Legis. Sess. (N.Y. 2001). The Program on Law and State Government at the Indiana University School of Law—Indianapolis recently sponsored a symposium exploring the desirability of central panels for Indiana. *See* Cynthia A. Baker, *Introduction: Evaluating State Government Designs of Executive Branch Adjudication*, 38 IND. L. REV. 385 (2005).

practice of decentralizing ALJs.

Most recently, Oregon created a pilot program for centralizing administrative hearings in a central panel.[16] The panel began operating on January 1, 2000, subject to a sunset provision in June 2005.[17] The panel's operations were reviewed by the Joint Legislative Audit Committee in 2002. The Committee's Report recognized that the relatively brief period of operation made evaluating the panel's effectiveness difficult. The Committee did note, however, that the appearance of fairness had been improved, agencies indicated that their staffs were better prepared for hearings, and some agencies found that the panel had exceeded their expectations.[18] Acting on this favorable report, the legislature eliminated the sunset provision, renamed the panel the Office of Administrative Hearings, changed the adjudicator's title to Administrative Law Judge, and provided a four-year term of office for the chief administrative law judge who can be removed only for conduct rendering him unfit for the office.[19] Oregon's Chief Administrative Law Judge, Thomas E. Ewing, has further documented the cost efficiencies that are generated by a central panel. He found that centralization enables a panel to handle more work than agencies with in-house ALJs. Agencies with few ALJs are inherently inefficient and costly because the staff is fixed while caseloads vary, creating wide fluctuations in the docket so that ALJs are alternately overburdened or underutilized.[20]

Another indication of the success of central panels has been the gradual accretion of jurisdiction in many states. Legislatures have added issues and agencies to the panels' dockets,[21] and other branches have become involved as well. In South Carolina, the state supreme court held that its central panel could hear appeals from the final decisions of the Department of Corrections in inmate grievance matters.[22] Most importantly, agencies have negotiated with the panels

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16. Heynderickx, *supra* note 1, at 239-40 (discussing the creation of the central panel); Ewing, *supra* note 1, at 57 (discussing the implementation of Oregon's central panel).

17. The original sunset date of January 1, 2004, was extended to June 30, 2004, to avoid requiring affected agencies to prepare two budgets, depending upon whether the panel was reauthorized or not. STATE OF OREGON JOINT LEGISLATIVE AUDIT COMMITTEE, REVIEW OF THE HEARING OFFICER PANEL, Report No. 02-4, at 1 (Dec. 2002). Chief ALJ Ewing commented on the Legislative Audit Committee Report in Thomas E. Ewing, *Oregon's Office of Administration Hearings, A Postscript*, 24 J. NAT'L ASS'N ADMIN. L. JUDGES 21 (2004).

18. STATE OF OREGON JOINT LEGISLATIVE AUDIT COMMITTEE, *supra* note 17, at 6.

19. H.B. 2526, 72d Leg. (Or. 2003) (signed by the Governor on May 22, 2003).

20. Ewing, *supra* note 1, at 87-89.

21. Texas, for example, originally heard only cases from agencies without ALJs, but the legislature gradually added other agencies, including the authority to arbitrate some health matters. TEXAS STATE OFFICE OF ADMIN. HEARINGS, AGENCY STRATEGIC PLAN FOR THE FISCAL YEARS 2005-2009 PERIOD, at 6 and Appendix H (June 18, 2004), *available at* http://soah.state.tx.us/AboutUs/strategic_plan_2005_to_ 2009.pdf. *See also* Sheila Bailey Taylor, *The Growth and Development of a Centralized Administrative Hearing Process in Texas*, 17 J. NAT'L ASS'N ADMIN. L. JUDGES 113 (1997).

22. Al-Shabazz v. State, 527 S.E.2d 742, 754 (S.C. 2000). *See also* Slezak v. S.C. Dep't of

to conduct contested case hearings.[23] This growth of panel jurisdiction reflects the willingness of agencies, ALJs, and executives to work within the central panel model.

Finally, state officials are gaining the benefits of centralizing ALJs without having to statutorily create a central panel. Michigan, for example, created its central panel by Executive Order.[24] The Attorney General of Alabama created the Administrative Hearings Division within his office to provide senior lawyers, experienced in administrative law, to serve as voluntary ALJs upon the request of the agencies.[25] The Governor of Indiana consolidated three administrative adjudicative agencies in the same location to provide interaction between ALJs as well as some cost savings.[26] Kentucky has created a central panel of ALJs in the Office of the Attorney General.[27] In Virginia, the Administrative Law Advisory Committee of the Code Commission is studying a proposal for a central panel to replace the state's existing system of independent hearing officers supervised by the Executive Secretary of the Supreme Court.[28] These events indicate that central panels are very successful, are perceived to be so by state officials, and that the concept is likely to be adopted by legislation or other appropriate methods in the future.

III. AN UPDATE ON ALJ FINALITY

Over the past ten years some states have granted central panel ALJs the authority to enter final orders that are not subject to agency review. Louisiana

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Corr., 605 S.E.2d 506, 507 (S.C. 2004) (recognizing that ALJ Division has subject matter jurisdiction of all properly perfected inmate appeals); Wicker v. S.C. Dep't of Corr., 602 S.E.2d 56, 58 (S.C. 2004) (recognizing ALJ Division jurisdiction over certain inmate claims of deprivation of property interest); Sullivan v. S.C. Dep't of Corr., 586 S.E.2d 124, 128 n.5 (S.C. 2003) (recognizing ALJ Division jurisdiction over state-created liberty interests beyond sentencing credits and disciplinary issues).

23. Hoberg, *supra* note 1, at 238-39. Wyoming's central panel now conducts hearings for the Department of Family Services by agreement. E-mail from Lynne Kranz, Office Manager, Office of Administrative Hearings, to author (Nov. 10, 2003, 15:51:48 MT) (on file with author).

24. MICH. COMP. LAWS § 445.2001 (2001) (merging Michigan Departments of Commerce and Labor to create Department of Consumer and Industries Services, and creating a central panel by executive order).

25. State of Alabama, Office of the Attorney General, *An Overview of Divisions in the Attorney General's Office*, *at* http://www.ago.state.al.us/about_divisions.cfm (last visited Mar. 18, 2005) (describing Administrative Hearings Division in Alabama Attorney General's Office).

26. E-mail from Jon Laramore, Counsel to Indiana Governor Joseph Kernan to author (July 12, 2004) (on file with author).

27. KY. REV. STAT. ANN. § 15.111 (Banks-Baldwin 2004); *id.* § 13B.010. This has been viewed as a proto-central panel. Richard H. Underwood, *Administrative Adjudication in Kentucky: Ethics and Unauthorized Practice Considerations*, 29 N. KY. L. REV. 359, 362 (2002).

28. James R. Kibler, Jr., *Administrative Law, Annual Survey of Virginia Law*, 38 U. RICH. L. REV. 39, 40 (2003).

and South Carolina have adopted ALJ finality by statute,[29] and North Carolina and Oregon have adopted procedures which retain agency review but make it difficult for agencies to alter or amend ALJ decisions.[30] As discussed below, South Carolina is considering extending ALJ finality to the four agencies that review ALJ decisions so that all contested cases within the central panel's jurisdiction will have final orders entered by the ALJ.

In addition, agencies in some states have agreed to permit the panel ALJ to make the final agency decision without agency review. These agency decisions seem to be driven by external considerations. For example, in Tennessee, the Department of Health accepted a settlement agreement providing that if a Medicaid enrollee prevails at any stage in the appeals process, including before the state ALJ, the decision is binding on the state and its Medicaid contractors.[31] This provision was part of a comprehensive settlement agreement to end litigation against the department.

In Washington state, the Department of Social and Health Services decided to accept the ALJ's decision in certain benefit cases as final and not subject to appeal to the agency's Board of Appeals. The agency, however, retains appellate jurisdiction of ALJ decisions involving licensing matters. Benefit eligibility cases are fact driven and have relatively clear standards.[32] Health care licensing decisions are not only more important to the agency mission, but create more complex matters, making it more important, at least from the agency's perspective, to ensure the correct result. The agency's decision to forgo appeals in certain cases was the result of budgetary pressures that reduced the number of judges in the agency's Board of Appeals and forced it to reserve its manpower for more important and complex administrative decisions.[33]

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29. LA. REV. STAT. ANN. § 49:992(B)(2) (West Supp. 2002) (stating that agency does not have power to override final ALJ decision); S.C. CODE ANN. § 1-23-610(A), (B) (Law. Co-op. Supp. 2003) (providing for limited agency review only for agencies with boards or commissions, but not agencies with a single director). The statutes are discussed in Flanagan, *supra* note 3, at 1373-75.

30. N.C. STAT. § 150B-36(b) (2001) (providing that the agency must accept the ALJ's findings of fact unless clearly contrary to the preponderance of evidence); 1999 OR. LAWS ch. 849 § 12(3) (codified at OR. REV. STAT. § 183.650 (2003)) (providing that agency may change ALJ's finding of fact only if not supported by a preponderance of the evidence). The statutes are discussed in Flanagan, *supra* note 3, at 1377–81.

31. Order at 23, Grier v. Wadley, Comm'r Tenn. Dep't of Health, Civ. Action No. 79-3107 (M.D. Tenn. July 31, 2000).

32. *See* Michael Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. REV. 1067, 1109 (1992) (suggesting that agencies should accept ALJ decisions as final when cases are fact driven and do not involve matters of policy).

33. Telephone Interview with Brian Lingren, Manager, Washington Department of Social and Health Services Board of Appeals (Oct. 16, 2003).

A. South Carolina's Expansion of ALJ Finality

The only pending effort to adopt full ALJ finality is in South Carolina. The central panel in that state has been renamed the South Carolina Administrative Law Court, and it is now a court of record within the state's executive branch.[34] Presently, more than seventy-five percent of the panel's contested case docket results in a final decision by an ALJ.[35] The remaining contested cases are from four administrative agencies that, after a hearing before the Administrative Law Court, may be appealed to the agency under the restricted standard of review applied by the courts on appellate review.[36] Legislation was introduced in the South Carolina House of Representatives that would expand ALJ finality to all contested cases within the jurisdiction of the central panel. Although the bill died at the end of 2003-04 session, it is expected to be reintroduced in the 2005 session. In addition to the expansion of ALJ final order authority, the Administrative Law Court has appellate jurisdiction over the final decisions of some professional and occupational licensing boards.[37] The legislation would expand this appellate jurisdiction so that most administrative decisions by boards or commissions initially would be appealed to the Administrative Law Court before judicial review. Finally, judicial review of administrative decisions would be in the court of appeals rather than in the circuit court.[38]

The decision to establish ALJ finality in all contested cases heard by the Administrative Law Court reflects the inevitable consequences of the limited agency review standard adopted in the original ALJ statute.[39] As originally

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34. 2004 S.C. ACTS 202 (Apr. 26, 2004).

35. *See generally* S.C. ADMIN. LAW JUDGE DIV., ANNUAL REPORT 1999-2000, at 19-20 (May 22, 2001). The major agencies outside the jurisdiction of the Administrative Law Court are the Workers' Compensation Commission, as well as Public Service Commission, and the Employment Security Commission and most professional licensing boards, which hear cases as a body .

36. *See* S.C. CODE ANN. § 1-23-610(A),(D) (Law. Co-op. Supp. 2003) (stating relevant standard of review). The Department of Health and Environmental Control, which includes separate boards for the Coastal Zone Management Appellate Panel and the Mining Council, and the Department of Natural Resources are governed by boards. The South Carolina Supreme Court recently held that the standard of review applied by these agency boards was limited only to questions of law. Brown v. S.C. Dep't of Health & Envtl. Control, 560 S.E.2d 410, 418 (S.C. 2002).

37. Professional and occupational licensing boards within the Department of Labor, Licensing and Regulation hear cases as a body. Final decisions are appealed to the Administrative Law Court, which applies the same standard to board decisions as courts apply when reviewing administrative decisions. *See* S.C. CODE ANN. § 1-23-600(D).

38. H.B. 4792, 115th Gen. Assem. (S.C. 2004).

39. There is no published information explaining why the legislature adopted ALJ finality for most agencies when South Carolina's central panel was established in 1994. The panel was part of a major restructuring of state government in 1994. Individuals involved in drafting the provision recalled that ALJ finality was an original provision in the bill. Prior to that time, the only full time administrative adjudicators were in the Workers Compensation Commission, the Employment

enacted, agencies applied the standard of review used by the courts and could alter the ALJ's decision only for violations of the constitution or statutes, if the order was in excess of statutory authority, made upon unlawful procedure, affected by an error of law, or clearly erroneous, or arbitrary and capricious.[40] The judicial standard of review was, however, inappropriate for agency review of ALJ decisions. Courts have a limited review standard because of the deference to agency expertise, and because of separation of powers concerns arising from the judiciary's review of executive action.[41] These rationales for limiting judicial review do not apply to the agencies that themselves have expertise in the subject matter and are part of the executive branch.

The judicial review standard is also inconsistent with the agencies' statutory role of developing policy in a substantive area, as it inhibits the agency from exercising its expertise and policy functions. Under the standard, the agency may consider only questions of law.[42] Any attempt to enforce agency policy requires an appeal to the judiciary or a remand to the ALJ.[43] Moreover, findings of fact by the ALJ are subject to the substantial evidence test and therefore cannot be altered unless there is no evidence in the record to support them even if reasonable individuals, including agency officials statutorily charged with the duty to enforce a statute, find other conclusions more persuasive.[44] This standard

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Security Commission, and the Public Service Commission. In all other cases, the agency or board heard the case itself, or retained a private lawyer to conduct the hearing and make the report. The use of private lawyers as hearing officers was often criticized as expensive and prone to delay, and there were concerns about the selection of hearing officers and alternately, whether agencies would accept their findings. The defects of the prior system supported the creation of a panel, but not necessarily ALJ finality. Bybee, *supra* note 1, at 455 (stating that the concept of a central panel does not require ALJ finality).

40. *Compare* S.C. CODE ANN. § 1-23-610 (quasi-judicial and judicial review of administrative law judge), *with* S.C. CODE ANN. § 1-23-380 (judicial review upon exhaustion of administrative remedies).

41. *See, e.g.*, Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) (stating that the judiciary must defer to the statutory construction of Congress, or agencies delegated authority by Congress); Consolo v. Fed. Mar. Comm'n, 383 U.S. 607, 619-21 (1966) (stating that the substantial evidence standard of review shows proper respect for agency expertise); Guerard v. Whitner, 280 S.E.2d 539, 540 (S.C. 1981) (declaring that separation of powers and expertise of agency justify limited judicial review).

42. The judicial standard of review has been criticized as depriving the agencies of any policy role and for limiting them to purely legal decisions. *See* Benjamin T. Zeigler, The South Carolina Administrative Law Judge Division and the Limits of Central Panel Decision-Making Power 48 (1997) (unpublished J.D. writing requirement, Harvard Law School) (copy on file with author).

43. Dorman v. S.C. Dep't Health & Envtl. Control, 565 S.E.2d 119 (S.C. Ct. App. 2002).

44. *See* Reg'l Med. Ctr. of Orangeburg and Calhoun Counties v. S.C. Dep't Health & Envtl. Control, Civ. Action No. 99-CP-40-0664, at 8 (S.C. Ct. of Common Pleas, Richland County Nov. 4, 1999) (stating that the agency must accept ALJ findings of fact, although reasonable persons could draw other inferences from the evidence); Heifetz v. Dep't of Bus. Regulation Div. of Alcoholic Bev. & Tobacco, 475 So. 2d 1277, 1281-82 (Fla. Dist. Ct. App. 1985) (stating that an

also prohibits the agency from reconsidering any important factual findings even when they were strongly controverted at the hearing or involved mixed questions of law and fact. Finally, the ALJ statute was construed to eliminate any agency fact-finding even when the ALJ had not made any findings on the issue. Rather, the agency was required to remand the case to the ALJ for fact-finding.[45]

This form of de facto ALJ finality did not work.[46] As might be expected, a citizen board governing the agency had problems applying the limited standard of review for errors of law, and there was substantial litigation over the scope of the agency's authority.[47] The procedural tools available to the agency on review were limited and included only a reversal and remand for failure to find a fact, for an error of law, or for failure to enforce established agency policy.[48] Administrative adjudication was effectively turned on its head. The agency, knowledgeable and responsible in making policy, was forbidden to do so through adjudication. In its place, the ALJ, an expert in procedure and evidence, became the final word. This structure also made cases more complex and lengthy, often requiring multiple appearances before at least four tribunals, the ALJ, the reviewing agency, the circuit court acting it its appellate capacity, and the court of appeals or supreme court.[49] Remands to the ALJ for additional fact-finding or consideration of agency policy were particularly burdensome. In light of this experience, the elimination of the extremely limited, duplicative, and largely ineffective agency review recognizes that the original statute all but adopted de facto ALJ finality. The proposed changes make ALJ finality explicit, and the provisions authorizing direct appeal to the court of appeals or supreme court should significantly streamline the process by eliminating two levels of review.

IV. THE CHALLENGE TO THE LOUISIANA CENTRAL PANEL

There are no significant challenges to the concept of central panels. The Louisiana Supreme Court, however, recently faced and resolved some difficult questions generated by two provisions in Louisiana's central panel statute. Louisiana has ALJ finality and the agency does not review the ALJ's decision,[50] as do agencies in a few other states.[51] Louisiana also has a unique provision that

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administrative agency cannot reject the ALJ's ultimate finding of fact unless there is no substantive evidence from which the finding could reasonably be inferred).

45. Brown v. S.C. Dep't of Health & Envtl. Control, 560 S.E.2d 410, 418 (S.C. 2002).

46. *See* James F. Flanagan, *Report to the Judicial Council on the Administrative Law Judge Statute*, 18 NAT'L ASS'N ADMIN. L. JUDGES 371, 378-86 (1998) (addressing preliminary review of the operation of the South Carolina ALJ statute).

47. *See generally Brown*, 560 S.E.2d at 410-18; Marlboro Park Hosp. v. S.C. Dep't of Health & Envtl. Control, 595 S.E.2d 851 (S.C. Ct. App. 2004); *Dorman*, 565 S.E.2d at 119.

48. *See Dorman*, 565 S.E.2d at 119.

49. The courts have commented on the multiplicity of procedural steps. *See Brown*, 560 S.E.2d at 413; *Dorman*, 565 S.E.2d at 122.

50. LA. REV. STAT. ANN. § 49.992(B)(2) (West 2004).

51. *See* Flanagan, *supra* note 3, at 1373-82.

bars an administrative agency from appealing any ALJ decision adverse to the agency.[52] The agency is limited to advocacy before the ALJ, without any appellate role, regardless of the consequences of a particular decision or the significance of the issue on appeal.

An insurer's attempt to win approval of a new form provided the vehicle for Louisiana's Commissioner of Insurance to challenge the constitutionality of both provisions. The Commissioner refused to approve the proposed form because he found that the representations and warranties did not comply with the applicable provisions of the Insurance Code.[53] The insurer appealed the denial to the state's central panel, the Division of Administrative Law.[54] After a hearing, the ALJ ruled that the Commissioner erred in denying approval of the form "as a matter of law" and ordered approval by the Commissioner.[55] The Commissioner appealed that decision to the state district court, but the appeal was dismissed because of a statute barring agencies from appealing final ALJ decisions. The court of appeals upheld the dismissal, finding that the Department, as a juridical person, did not have any greater rights than granted it by the legislature.[56] The court of appeals also upheld the trial court's refusal to permit the Department to amend its petition to challenge the constitutionality of the statute, but suggested that the Commissioner had a judicial remedy through a declaratory judgment

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52. When Louisiana created its central panel in 1996, the definition of "person" in its Administrative Procedure Act did not include an agency, so an agency was not within the class of aggrieved persons who could appeal a final decision. The right to appeal was unnecessary when the agency reviewed the ALJ's decision and made the final agency decision, but the right to appeal became more significant when the ALJ made the final agency decision. *See* Bybee, *supra* note 1, at 458. In 1996, the legislature explicitly denied agencies the authority to appeal to the courts. LA. REV. STAT. ANN. § 49.992(B)(3).

53. Commissioner's Petition for Preliminary and Permanent Injunctions and Petition for Declaratory Judgment at 2, Wooley v. State Farm Fire & Ins. Co., No. 50,2311 (La. Dist. Ct., Parish of E. Baton Rouge n.d.), *available at* http://biotech.law.lsu.edu/la/briefs/LL03.pdf [hereinafter La. Injunction Petition].

54. LA. REV. STAT. ANN. § 22.1351(2) of the Insurance Code provides for a hearing, "upon written demand for a hearing made by any person aggrieved by any act, threatened act, or failure of the commissioner of insurance to act." Prior to the creation of the central panel the matter would have been heard in the agency. However, LA. REV. STAT. ANN. § 49.992 now gives the Division of Administrative Law exclusive authority to conduct such hearings. There is some dispute over whether this issue should have been subject to a hearing. For example, Professor Paul R. Baier, amicus curiae at the request of the court, maintained that the suitability of the form should not have been subject to adjudication by the ALJ when there is no statutory requirement for a "trial-type adjudication of the legal dispute between the Department and State Farm . . . [because] La. R.S. 22:1351(2) does not contemplate remitting the questions of law and policy involved in the underlying dispute to the Division of Administrative Law and its ALJs." Post Trial Brief of Amicus Curiae LSU Professor of Law Paul R. Baier at 2, *Wooley*, No. 50,2311, *available at* http://biotech.law.lsu.edu/ la/briefs/AMICUS-BAIER.pdf [hereinafter Baier Amicus].

55. La. Injunction Petition, *supra* note 53, at 3.

56. Brown v. State Farm Fire & Cas. Co., 804 So. 2d 41, 44-46 (La. Ct. App. 2001).

action, which soon after followed.[57]

The legal positions of each party are easily sketched. The Commissioner argued that denying the agency the right to appeal unconstitutionally violated separation of powers because the statute vests judicial power in the executive branch, thus divesting the judicial branch of its inherent power to decide questions of law.[58] The Division of Administrative Law argued that it was not exercising judicial power, and that the legislature has plenary power to define the authority of state agencies unless specifically prohibited by the state constitution. The Division further argued that the Department, as a juridical body rather than an individual, has only the authority granted to it by the legislature, which has specifically denied agencies the right to appeal.[59]

The Commissioner also argued that the Department of Administrative Law violates provisions in the state constitution by creating a court of non-elected judges exercising judicial power, which is not constitutionally authorized. While the action was pending, a constitutional amendment was proposed that provided explicit constitutional authority for the central panel and the limitation on agency appeals.[60] The proposed amendment was defeated on October 4, 2003. The trial court ruled in favor of the Commissioner on November 13, 2004, and declared that Acts 739 and 1332 were unconstitutional and violated the separation of powers.[61] The matter was appealed directly to the Louisiana Supreme Court which reversed the trial court.[62]

The supreme court first reviewed the history of the office of the Commissioner of Insurance. The 1921 constitution authorized its creation but it was not established by the legislature until 1956. A subsequent constitutional amendment made the commissioner an elected officer of the executive branch in 1960.[63] The Constitutional Convention of 1973 maintained it as an elected constitutional office, but the delegates were strongly divided on whether its

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57. *Id.* at 46-47.

58. La. Injunction Petition, *supra* note 53, at 6.

59. Post-Trial Memorandum of the Division of Administrative Law at 9-12, Wooley v. State Farm Fire & Cas. Ins. Co., No. 50,2311 (La. Dist. Ct., Parish of E. Baton Rouge n.d.), *available at* http://biotech.law.lsu.edu/la/briefs/LL67. pdf [hereinafter Post-Trial Memo]; *see also* Brief of Amicus Curiae on Behalf of the Louisiana House of Representatives at 3, *Wooley*, No. 50,2311, *available at* http://biotech.law.lsu.edu/la/briefs/LL18.pdf.

60. Act No. 1298-2003 provided for a constitutional amendment to add Art. XII Section 15 to create authority for the legislature to provide for a system of administrative law and the qualifications, authority, and appointment of administrative law judges. In addition, the constitutional amendment sought specific authority to control agency appeals. Section 15(c) provided: "The legislature may provide by law for access to courts by a governmental agency or public official seeking judicial review of an administrative agency determination." House Act No. 1298 (La. 2003).

61. Act 739 created the Division of Administrative Law in 1995, Act 1332 deprived agencies the right to appeal.

62. Wooley v. State Farm Fire & Cas. Ins. Co., 893 So.2d 746, (La. 2005).

63. *Id.* at 758.

duties should be defined in the constitution or by statute. They rejected proposals that would have given the commissioner specific powers and duties. Ultimately, the constitution did not specify the powers of the office which were left to be established by the legislature.[64] The primacy of the legislature in defining the powers of the office was a significant factor in the court's rationale.

The court then addressed the constitutionality of Act 739 of 1995 which created the Division of Administrative Law. The Commissioner argued that Act 739 vested judicial power in the Division and violated several constitutional provisions.[65] The supreme court, however, found that the adjudicative and fact-finding powers exercised by the Division were quasi-judicial, rather than judicial powers.[66] Therefore, the Act did not vest judicial power in the executive branch, or create a non-elected judiciary. The court also found that the Act did not divest the district court of its original jurisdiction authorized by article V, section 16(A) of the Louisiana Constitution.[67] The approval of insurance forms was not a matter traditionally litigated in the original jurisdiction of that court so their adjudication by the Division did not affect the trial court's jurisdiction.[68] The Commissioner's claim that the creation of the Division, with final order authority, unconstitutionally usurped his authority to regulate insurance was also rejected. The court inferred that the Commissioner's lack of constitutionally specified powers and duties meant that defining the scope of the office was the legislature's prerogative. The court recognized that eliminating agency review was a significant change but concluded that the legislature clearly had the authority to subordinate the Commissioner's decisions to that of the ALJs.[69]

The court then addressed the constitutionality of Act 1332 of 1999 which specifically deprived agencies of the authority to appeal any ALJ decision. The court found that the constitution protected persons, but not state agencies from the laws passed by the legislature. Consequently, a state agency has no due process rights, and no right of access to the courts. Lacking a constitutional right to appeal, the agency must depend upon statutory authority, which clearly does

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64. *Id.* at 759-61. The provision ultimately adopted provided: "Commissioner of Insurance: Powers and Duties. There shall be a Department of Insurance, headed by the commissioner of insurance. The department shall exercise such functions and the commissioner shall have such powers and perform duties authorized by this constitution or provided by laws." *Id.* at 761. The only duties prescribed by the constitution authorize the commissioner to dissolve or otherwise terminate a private, nonprofit corporation established to deliver workers compensation insurance. *Id.* at 767.

65. The Commissioner asserted that the Act vested judicial power in executive branch employees, provided for non-elected judges in the executive branch and divested the judicial branch of its power to decide certain questions of law, as well as violating the doctrine of separation of powers. *Id.* at 762.

66. *Id.* at 763.

67. *Id.* at 764.

68. *Id.*

69. *Id.* at 767.

not exist in this case, and the court was unwilling to infer such authority.[70] The court concluded by noting that the Commissioner did have a judicial remedy. While he could not appeal the final decision of an ALJ, he could file a declaratory judgment action in district court seeking a determination of whether the ALJ's decision was decided properly. The district court would not have to defer to the decision of the ALJ and would be free to decide the issue according to the substantive law. Thus, the Commissioner had a procedure for establishing that the ALJs decision was not a correct statement of the law, although the declaratory judgment was not likely to change the result of the particular case.[71]

The *Wooley* opinion is correct on several issues. The creation of the Administrative Law Division is presumptively constitutional and ALJs do exercise quasi-judicial, rather than judicial power. That administrative adjudication can be split between the agency and a central panel without violating separation of powers is also acceptable.[72] Certainly this method has been used in some federal agencies without controversy.[73] How the issue will be resolved by other states is dependent upon each jurisdiction's view of the doctrine, which can be significantly different from the federal view.[74] Although the issue is controversial and complex, especially when ALJ finality is involved, the opinion is persuasive that a legislature may allocate administrative adjudication between different entities within the executive branch without offending the separation of powers doctrine.[75]

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70. *Id.* at 767-70.

71. *Id.* at 770.

72. Several commentators have raised the separation of powers issue in the context of ALJ finality. *See* Rossi, *Final Orders on Appeal*, *supra* note 2, at 10-12; Bybee, *supra* note 1, at 462-63 (commenting on the Louisiana statute); *see also* McNeil, *supra* note 1, at 501-06 (discussing administrative adjudication that interferes with the prerogatives of the judicial branch). The separation of powers issue was one consideration in the enactment of the North Carolina statute that led to authorizing the courts to resolve factual disputes between the ALJ and agencies. Mary Shuping, N.C. Gen. Assem. Research Div., Contested Cases Under Article 3 of the APA: Background Information & Opinions on the Constitutionality of OAH Final Decision-Making Authority, Presented to the Joint Legislative Administrative Procedure Oversight Committee 11-50 (Feb. 17, 2000) (copy on file with the author). Two memoranda by officials in the Office of the Attorney General argued that ALJ finality violated the separation of powers doctrine while a memorandum by committee counsel argued to the contrary.

73. *See infra* note 121 and accompanying text.

74. For example, in South Carolina, the State Budget and Control Board has broad authority over state employment, procurement, and fiscal matters, and is governed by a board composed of the Governor, State Treasurer, State Comptroller General, Chair of the Senate Finance Committee, and the Chair of the House Ways and Means Committee. The South Carolina Supreme Court has found that the legislative participation is not a violation of the state doctrine of separation of powers. State *ex rel.* McLeod v. Edwards, 236 S.E.2d 406 (S.C. 1977).

75. Rossi, *Problems with ALJ Finality*, *supra* note 11, at 63-66. The question is made more complex because the executive branch does not have appointment power over ALJs, rendering them independent of direct executive influence.

The court's handling of the issue of judicial review however, is unconvincing, and a close reading of the opinion suggests that many issues remain to be finally resolved. Three aspects of the opinion merit comment. First, the opinion may be very narrow. The court carefully notes throughout the opinion that the issue involves the approval of an insurance form.[76] The constitutional and statutory history of the Office of the Commissioner of Insurance also played a key role in the court's analysis.[77] An opinion analyzing the approval of insurance forms, in the context of the commissioner's lack of constitutional authority and clear subordination to the legislature for a definition of his duties, suggests that different facts might lead to different results.

More significantly, the opinion directly addresses the separation of powers issue only from its effect on the Commissioner, and its effect on the original jurisdiction of the trial court. The court only obliquely faces the Commissioner's argument that the statutes combine to deprive the judiciary of *its* right to decide certain questions of law.[78] A substantial and important class of cases cannot be reviewed because one party is deprived of the ability to appeal the ALJ's decision. On this critical point the court states: "We discern no violation of the requirement of separation of powers. Instead of viewing the Commissioner's lack of a right to appeal the ALJ's adverse decision as a usurpation of judicial power, we view it as a lack of procedural capacity on the part of the Commissioner."[79] The court implicitly recognizes that it is deprived of jurisdiction of a class of cases but chooses to attribute the loss to a technical issue of capacity, thereby avoiding the important issue of the statutes' impact on its power. This also explains the court's discussion of declaratory judgment as a way for the Commissioner to seek a judicial determination of the legal correctness of the ALJ's decision. Declaratory judgment arguably provides a procedural way for the court to hear these legal question, although it is one with significant limitations. As the court notes, any declaratory judgment is not likely to affect the underlying result.[80] If the rights of the parties are fixed, nothing hinges on the outcome of the declaratory judgment. The only dispute is between the Commissioner and the ALJ on a question of law, and this may be viewed as only an advisory opinion.[81] As Chief Justice John Marshall said, "[i]t is emphatically the province and duty of the judicial department to say what the law

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76. *Wooley*, 893 So.2d at 763, 765.

77. *Id.* at 758-61, 766-67, 769-70.

78. *Id.* at 764-65. The court is aware of the larger issue because it notes that the trial court declared Act 739 unconstitutional because it divests "the judicial branch of its inherent power to decide matters involving questions of law." *Id.* at 762. Later it notes that Act 1332 "precludes judicial control or oversight" of the ALJ and that it is "the ultimate function of the courts to determine the legality of an ALJ's administrative decisions." *Id.* at 768.

79. *Id.* at 769.

80. *Id.* at 770.

81. Edwards v. Parker, 332 So.2d 175, 180-81 (La. 1976) (refusing to render advisory opinion on issues in declaratory judgment); LA CODE CIV. PROC. ANN. art. 1876 (West 2003) (court may refuse to enter declaratory judgment when it would not eliminate the controversy).

is."[82] On some decisions rendered by the Division, however, it appears that the Louisiana courts are not able to exercise this function.

The opinion raises as many questions as it answers. The separation of powers issue, as it affects the judiciary, may not be resolved. The use of declaratory judgment is problematic. The court ruled that ALJ decisions are not entitled to res judicata effects, raising questions of their impact in related litigation.[83] Further, the court carefully noted that the ALJs do not enforce their own orders, which is a judicial function.[84] This raises interesting questions about how ALJ decisions are to be enforced. The First Circuit Court of Appeals in Louisiana recently faced this problem.[85] In that case, the ALJ overruled the Department of Insurance's decision to deny the petitioner renewal of his bail bond agent's license. The Department refused to issue the license, and petitioner sought mandamus to compel it to grant the license to him. The trial court granted mandamus but the court of appeals reversed, finding mandamus an inappropriate remedy, leaving the petitioner to an uncertain procedure and future in the trial court, which includes intervention in the Commissioner's declaratory judgment action.[86] The use of an independent action for declaratory judgment is a consequence of eliminating agency review and the agency's right to appeal adverse ALJ decisions, as well as the limited quasi-judicial power of the Division. This suggests that deviating from the traditional model of agency review and appellate review generates unintended consequences yet to be resolved.

Finally, the underlying issues in the *Wooley* case raise significant issues in administrative adjudication and central panels. There is the question of whether this is the type of matter that should be adjudicated by an ALJ. The issue in dispute concerned the language of an insurance form and whether it satisfied the Insurance Code, which is either a pure question of law, as found by the ALJ, or a question of policy in interpreting the statute. By any standard, the agency is in the best position to make a decision, subject to judicial review about the suitability of an insurance form. The ALJ has nothing to contribute to the issue because the facts are conceded, the decision does not hinge on the credibility of the witnesses, and the ALJ does not possess any special knowledge that provides a superior basis for the decision. Nonetheless, under the central panel statute the matter was heard by an ALJ.[87] At the very least, this case suggests that great care

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82. Marbury v. Madison, 5 U.S. (1Cranch) 137, 177 (1803).

83. *Wooley*, 893 So.2d at 771.

84. *Id.* at 764.

85. Bonvillian v. Dep't of Ins., __So. 2d__, 2005 WL 362495 (La. Ct. App. Feb. 16, 2005).

86. The Department argued that the petitioner had alternate remedies and could have intervened in a declaratory judgment action brought by the Department, or could have sought injunctive relief. The Department also argued that the ALJ might not have the authority to grant the waiver required to issue the license. *Id.* at *2.

87. The Commissioner argued, and the Division of Administrative Law apparently agreed, that the relevant statutes required that it be submitted to an ALJ. Louisiana statute requires the Commissioner to provide a hearing when demanded and requires all hearings to be conducted by

must be taken in developing the central panel's jurisdictional statutes to avoid unintended consequences. effect

The dispute also illustrates that final order authority generates inconsistent positions between the agency and the ALJs. In this case, it was a fundamental difference about the acceptability of an insurance form. The ALJ's decision replaces the agency's regulatory view with that of the particular ALJ. The ruling against the agency undoubtedly lessens the agency's ability to negotiate and resolve similar disputes without litigation. The pleadings and motions filed in the case also reveal other more fundamental differences between the agency and the ALJs. Professor Baier, as amicus, reported that the agency and ALJs differ substantially on a major enforcement issue. The Department strictly enforces a regulation authorizing the suspension of a license when the licensee has plead guilty to a crime. However, the ALJs have rejected the Commissioner's position and apply an alternative standard that considers whether the criminal conviction affects the licensee's ability to perform as an agent,[88] and have reversed license revocations based upon guilty pleas.[89] Although reasons can be advanced for either position, the ALJs and the Department differ significantly on a major enforcement issue.

Denying an agency the right to appeal an adverse decision only exacerbates the potential for conflicts between the agency and ALJ-created law because there is no effective mechanism to resolve the differences and achieve a uniform standard on any particular question.[90] Moreover, as Professor Bybee noted in the

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a member of the Division of Administrative Law. LA REV. STAT. ANN. § 22.1351 (West 2004); LA. REV. STAT. ANN. § 49.992. Professor Baier, amicus curiae appointed by the court, argued that a hearing before the ALJ was not required. Baier Amicus, *supra* note 54.

88. *See In re* Youree Jean Anderson, Docket No. Ins 95-2170 (La. Div. Admin. Law Mar. 13, 1998) (conviction for bankruptcy fraud insufficient to suspend license); *In re* Homer E. Parker, Docket No. 2000-2306-Ins. (La. Div. Admin. Law May 26, 2000) (plea of guilty to misdemeanor involving moral turpitude is insufficient to suspend license under the facts of the case); *In re* Claude D. Leger, Docket No 99-5823-INS (La. Div. Admin. Law Apr. 14, 2000) (plea to misprision of a felony insufficient to support revocation of license).

89. Baier Amicus, *supra* note 54, at 11 (citing *In re* Youree Jean Anderson). I am told that Louisiana's Insurance Department makes exceptions to its stated policy of revoking licenses for felony convictions but does not publish its actions. Interview with R. Bryan McDaniel, Administrative Law Judge, Louisiana Division of Administrative Law, Atlanta, Georgia (Aug. 6, 2004).

90. The legislative history suggests that the motivation for limiting judicial review for agencies was to prevent successful litigants from being overturned by the ALJ because the agency's greater resources allowed it to continually appeal the decision. Post-Trial Memo, *supra* note 59, at 7 (citing minutes of the May 6, 1996 meeting of the House Committee on House and Governmental Affairs). A comparison was made to the criminal law where the state is barred from challenging a finding of not guilty. "[The] people who are regulated by the state should not be treated any worse than is a person who is acquitted of a crime at a lower court level, the state should not have a right to come back and appeal that acquittal." *Id.* (citing minutes of June 9, 1999 meeting of Senate committee on Senate and Governmental Affairs). This rationale is an unjustified

first article discussing Louisiana's statute, the legislature created a structure that strips agencies of any policy-making authority through adjudication and gives it to ALJs "whose judgment must be so valued that the court must not even see any competing vision offered by the agencies."[91]

Louisiana's statute preventing an agency's access to the judicial process is fatally flawed. Even if it is constitutional and does not violate separation of powers, as a practical matter there is no justification for granting judicial preference to the opinions of an ALJ over that of the agency legislatively charged with the responsibility of implementing a statutory scheme. That this procedure inevitably will generate conflicts between agencies and ALJs, and there is no effective way to resolve them only makes the problem worse. Declaratory judgment actions will only complicate and delay resolution of these cases. Even with ALJ finality, the agency should have the ability to challenge the decision in the courts. Despite these serious challenges, none are directed at the concept of a central panel, or the advantages in efficiency, perceived fairness, and professionalism that are associated with the panels.

V. A Review of Arguments in Favor of ALJ Finality

The agency's authority to establish policy through agency review of administrative action is a long-standing principle of administrative law that has continually been affirmed by the Supreme Court.[92] Given the strong history of agency review, and its justifications, it is surprising that ALJ finality has emerged as a trend in state administrative law. Part of the reason is that ALJ finality is developing in the shadow of the central panel movement. The success of central panels in providing efficient and professional fact-finding in administrative adjudication, and addressing the perceived unfairness of having the ALJ employed by the agency, plays a key role in the adoption of ALJ finality. The efficiency and fairness rationales for centralizing ALJs have been uncritically extended to give the ALJ final order authority without considering either the evidence or the consequences of this radical change in administrative adjudication.

This approach is wrong for two reasons. First, the issues in ALJ centralization and final order authority are fundamentally different. The finding of facts is not the same as making the final decision, which often depends upon broader issues of policy, statutory construction, and consistency of the enforcement efforts. Second, posing the issue as one of fairness or efficiency conceals the key issues, which are who is the more appropriate decisionmaker, and what are the consequences of replacing the agency with the ALJ?

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extension of a principle of constitutional criminal law to civil law, as well as a profound distrust of agencies, and the judiciary, and their responsibility to affirm ALJ decisions that are consistent with the law.

91. Bybee, *supra* note 1, at 459.

92. *See* SEC v. Chenery Corp., 332 U.S. 194 (1947); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969); Koch, *supra* note 2.

Experience shows that agencies are the more appropriate final decisionmakers because of their greater knowledge and expertise in the subject matters, as well as the severe consequences ALJ finality would produce by dividing policy development into two arms and necessarily generating inconsistencies between the approach of the agency and the ALJs.

Nevertheless, the argument that ALJs in central panels make administrative adjudication more fair, and that this fairness justifies final order authority, is intuitively appealing and must be addressed in any discussion of ALJ finality. As a preliminary matter, central panels address the *perception* of unfairness in fact-finding arising from the agency's employment of the ALJs that hear their cases.[93] To change administrative adjudication on perceptions is unjustified. The process of developing facts by the ALJ and having the agency make the final decision based on the record, is the central principle of modern administrative adjudication in the federal system, and overwhelmingly in the state systems. The key question is whether there is sufficient support for the proposition that agency review is unfairly exercised. Any experienced administrative lawyer may be able to cite examples, usually from lost cases, that support a person's view that agency review is flawed, but is there more than anecdotal support for this view?

A. The Statistics on Agency Review

The available data strongly supports the proposition that agencies are not systematically abusing their power to find facts, nor are they acting contrary to the law and the facts during their review of ALJ decisions. The most complete data were collected by Professor Charles Daye of North Carolina who studied all available administrative cases heard by North Carolina's central panel from 1986 until 2000, when the statute was substantially amended to adopt a form of ALJ finality.[94] Professor Daye's study consisted of two parts. The first examined all ALJ decisions and determined whether the ALJ's decision was accepted or rejected by the agency.[95] The second part of the study examined all appellate cases deciding substantive (rather than procedural) issues and determined whether the outcome in the North Carolina Court of Appeals and Supreme Court was affected by whether the decision on review was one made by the ALJ and

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93. Hon. Edward J. Schoenbaum, *Improving Public Trust & Confidence in Administrative Adjudication: What Administrative Law Practitioners, Judges and Academicians Can Do*, 53 ADMIN. L. REV. 575, 579 (2001).

94. Daye, *supra* note 1.

95. *Id.* at 1615. The Office of Administrative Hearings, by statute, received the final agency decision and compared the final decision with the agency decision to develop these statistics. Judge Julian Mann, III, *Administrative Justice: No Longer Just a Recommendation*, 79 N.C. L. REV. 1639, 1645 (2001). The cases were categorized as to whether the ALJ's recommendation was for the petitioner or agency and whether the agency accepted, rejected, or accepted or rejected in part, the ALJ's recommended decision. Thus, the data reflects the rates at which the petitioner or agency prevailed before the ALJ and after agency review.

accepted by the agency, or whether the agency had reversed the ALJ.[96] Professor Daye did not determine the legal accuracy of the ALJ's decision, or of any decision by the agency to reverse the ALJ, or of the courts in reviewing any of the final agency decisions.[97] Thus, the study identified whom the ALJ and the agency ruled for, but not why any change was made, nor the legal and factual sufficiency of any decision by any ALJ, agency, or court.

There are three central conclusions in Professor Daye's study.[98] First, ALJs ruled in favor of the agencies in seventy-six percent of the cases.[99] Second, agencies accepted eighty-two percent of the decisions rendered by ALJs.[100] This included almost all cases in which the ALJ found for the agency, although agencies did reverse a few cases when the ALJ had rendered a decision favorable to the agency.[101] The agencies accepted slightly more than half of the decisions that favored the applicant and reversed the remainder.[102] The third finding was that the North Carolina appellate courts affirmed the same percentage of cases when the agency adopted the ALJ's proposed order, as when the agency rejected it.[103] Thus whether the decision was made by the ALJ and adopted by the agency, or the agency rejected the ALJs decision and made its own findings and final decision, was immaterial to the outcome on appeal.

In my opinion, Professor Daye's study supports the proposition that agencies are making reasonable decisions during agency review. In sum, ALJs and agencies agreed, in full, in eighty-two percent of the cases, and, in part, in an additional six percent of cases.[104] This suggests that the differences between ALJs and agencies arise in few cases. Moreover, the data does not indicate why

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96. Daye, *supra* note 1, at 1633-37.

97. *Id.* at 1614.

98. The conclusions that follow are my own and are a summary of a more extended analysis in an earlier article. *See* Flanagan, *supra* note 3, at 1389-98. Additionally, readers are invited to review Professor Daye's groundbreaking study in detail.

99. Daye, *supra* note 1, at 1615 (displaying OAH Chart1: Total Adoptions of Recommended Decisions with Proportion for Agency and Petitioner: Inception Through 1999).

100. *Id.* at 1616 (displaying OAH Chart 2: Total OAH Decisions with Proportion for Agency and Petitioner; Inception Through 1999).

101. *Id.* at 1619 (displaying OAH Chart 5: Total Agency Rejections with Proportion for Petitioner and Agency; Inception Through 1999).

102. *Id.* at 1618 (displaying OAH Chart 4: Number of ALJ Recommended Decisions for Petitioner with Agency Disposition; Inception Through 1999).

103. *Id.* at 1622 (displaying APA Study Chart 2B: Agency Adopted ALJ Recommendation—Superior Court Disposition) (Superior Court affirmed agencies adoption of ALJ decision in fifty-eight percent of cases, and affirmed agencies rejection of ALJ decision in fifty-three percent of the cases); *id.* at 1628 (displaying APA Study Chart 9: Agency Rejected ALJ Recommendation; Court of Appeals Disposition) (affirming fifty percent of cases); *id.* at 1629 (displaying APA Study Chart 10: Supreme Court Disposition) (Supreme Court affirms six of ten cases in which agency rejects ALJ decision).

104. *Id.* at 1616 (displaying OAH Chart 2: Total OAH Decisions with Proportion for Agency and Petitioner; Inception Through 1999).

the agency rejected the ALJ's decision, or the extent to which the ALJ and agency were otherwise in agreement, or whether the difference was one of law or fact. Reversals by the agency on questions of law are uncontroversial. Likewise, accepting the factual determinations but rejecting a proposed penalty, reflects a judgment on enforcement which belongs to the agency.[105] Only agency reversals of ALJ fact-finding may be questionable and that depends on whether the rejected facts are historical or mixed questions of law and fact which are generally subject to de novo review.[106] The bare statistic that agencies did not accept the ALJ's decision in eighteen percent of the cases undoubtedly overstates the differences between ALJs and agencies during agency review.

There is no evidence of agency abuse of review powers because the study only reported the outcomes of ALJ decisions and agency review and did not assert that any decision was legally correct or incorrect. The indirect evidence suggests that agency review was reasonable and that agencies are making principled decisions during agency review. Neither the high acceptance rate of ALJ decisions, including about one half of the decisions unfavorable to the agency staff's position, nor the reversal of some of the ALJ decisions favorable to the agencies, would have occurred if agencies were consistently abusing their power of review to make agency-favorable decisions. Further support comes from the appellate courts' review of the final agency decisions in North Carolina. Professor Daye's study shows that the agency's action in reversing or accepting the ALJ's proposed decision had no effect on whether the final agency decision was affirmed or reversed by the courts. Certainly, the decisions of the courts do not suggest that ALJ decision making has any advantage over agency decision making.[107]

To my knowledge there has been no systematic study of agency review that provides evidence of an abuse of agency review powers. The argument for a misuse of agency review is based on anecdotal evidence only and it has several weaknesses. Such evidence applies only to the individual case and cannot support any generalizations, particularly about the extent of the problem in other cases. It often comes from interested sources, and is subject to equal and opposite anecdotal evidence of abuse of ALJ authority.[108] In sum, the argument

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105. McCown & Leo, *supra* note 2, at 64, 91 (sanctions are a decision for the agency).

106. The deference agencies are required to give an ALJ's findings of fact and law on review is limited. Generally, state Administrative Procedure Acts provide agencies almost unlimited legal authority to alter or amend findings of fact and law, subject to the rule in most, but not all states, that the ALJ's credibility determinations are entitled to deference. A few states impose a higher standard than "substantial evidence" to support agency changes in the facts. Courts accord substantial deference to the agency's findings of fact and interpretations of law. *See* Flanagan, *supra* note 3, at 1364-73, 1403-04.

107. Daye, *supra* note 1, at 1626.

108. Many central panels survey the litigants and attorneys. These surveys show that the strong majority are satisfied, but litigants, perhaps, because of the nature of litigation, are not always happy with the ALJ. For example, attorneys in Minnesota rated 77.8% of judges as excellent or good at basing their decisions on the law or evidence, but 22.2% rated them as fair,

that agencies are unfairly using their powers of review lacks support, and provides no justification for replacing agency review with ALJ finality. The central issue in ALJ finality remains: who is the more appropriate final decisionmaker and what are the consequences of changing from the agency to a central panel ALJ?

B. Litigant Dissatisfaction as a Justification for Limiting Agency Review

Litigant dissatisfaction has been cited to support limiting agency review in North Carolina and Oregon.[109] Professor Daye established that the perception of agency unfairness is due largely to the fact that agencies generally prevail in administrative adjudication.[110] In North Carolina, the agency prevailed in at least seventy-six percent of cases heard by the ALJs. Since these initial decisions are made by the ALJs before agency review, the results must be compelled by the substantive laws and regulations as applied by ALJs to the facts. The law is the critical factor in the agency's success, rather than whether the final decisionmaker is the ALJ or the agency. If litigants are frustrated in administrative adjudication it is because the laws and regulations prohibit the conduct under review. Moreover, a high agency success rate should be expected in an efficient enforcement system. An agency would be derelict in its enforcement and regulatory obligations if it routinely brought actions that failed when tested in a trial-type hearing. A low success rate indicates either poor preparation or an aggressive view of the law that is not supported by the facts proven at trial. A high success rate before ALJs indicates prudent selection of issues to litigate. Agencies do change some ALJ decisions during review, but the vast majority of applicant losses are at the ALJ level, and the final agency decisions are consistent with the laws or the facts, as seen by the affirmance rate before the courts.

There are two reasons why litigants blame agencies rather than the substantive law. First, a central panel changes the fundamental perception of agencies, and unintentionally, fosters a negative attitude toward them. Central panels clearly enhance the status of the ALJs as decisionmaker, and correspondingly reduce that of the agency. Before central panels, administrative adjudication was clearly the sole province of the agency. The contested case took place at the agency and fact-finding by the ALJ was a preliminary step to the agency's rendering the final decision. Neither the process nor an APA accorded the findings of the ALJ special status, and proposed decisions by ALJs were clearly subject to review and amendment by the agency. With central panels, adjudication becomes a two-step process with fact-finding now taking

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poor, or very poor. MINNESOTA MANAGEMENT ANALYSIS DIVISION, OFFICE OF ADMINISTRATIVE HEARINGS, JUDICIAL DEVELOPMENT PROGRAM, OFFICE-WIDE SUMMARY 26 (1999). Wyoming attorneys rated 87.6% of hearings on driver's licenses and workers compensation matters as fair and impartial. WYOMING OFFICE OF ADMINISTRATIVE HEARINGS, ANNUAL REPORT 4 (2000).

109. Heynderickx, *supra* note 1, at 242; Mann, *supra* note 95, at 1645-46.

110. Daye, *supra* note 1, at 1611.

place before a trained adjudicator outside the agency who renders a preliminary decision. Agency review follows as a separate and distinctive step in which the case returns to the agency for another decision. From the participant's point of view, an agency that does not adopt the ALJ's decision favoring the litigant is biased, and if the agency affirms the ALJ's decision, its decision is irrelevant, and the process time consuming, and expensive. The creation of the central panel has transferred the focus of adjudication from the final agency decision to the fact-finding by the ALJ, and enhanced the latter's importance and status. Missing from this picture is any understanding of the traditional role of the agency as ultimate decisionmaker based upon the fact-finding by the ALJ, or the agency's responsibility for consistent enforcement and application of the statutory scheme.

Also leading to some muddling of the debate is that ALJ finality often appears as a choice between a final decision by a biased agency versus that of an independent ALJ. That inevitably colors the discussion and assumes its conclusion, for who can be in favor of a biased agency when an independent ALJ is available? Agencies certainly have a perspective on the law and regulations because they have been charged with the enforcement of a statutory scheme, and they have institutional knowledge and experience with the subject matter that may be considered in the final decision. The hidden assumptions, that independent ALJs in central panels are necessarily without views on the topic and that those views may affect the outcome, is not justified. In fact, all adjudicators, as humans, have their own predilections and preferences. It would be a strange individual who reached the position of ALJ or agency head that had not formed opinions on many issues. Lawyers exploit these aspects of the decisionmaker through forum selection, judge shopping, and advocacy designed to appeal to the particular judge. Rules that allow a party to seek recusal of a judge, or replacement by a different judge are a recognition of this problem as well as a partial solution.[111] Regardless of whether the decisionmaker is an ALJ or an agency head, that person will have a perspective on the law and facts that may differ from others.

There are three significant questions. What are the relative qualifications of the agency and ALJ to interpret and apply the law in administrative adjudication? What consequences flow from selecting either the agency or the ALJ? Should the final decisionmaker be one entity, the agency, or be one or more ALJs in a central panel who may have differing perspectives on the law and regulations? In my opinion, the perspective of the agency is more predictable than that of each of the ALJs on a central panel who may be assigned the case.

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111. CAL. GOV'T CODE § 11425.40 (West 2001). The California Office of Administrative Hearings has implemented the procedure through regulation. CAL. CODE REGS. tit. 1 § 1034 (2002). *See also* OR. REV. STAT. § 183.470 (2001). ALJs are aware of these issues. *See generally* Hon. Bruce H. Johnson, *Strengthening Professionalism Within an Administrative Hearing Office: The Minnesota Experience*, 53 ADMIN. L. REV. 445 (2001); Schoenbaum, *supra* note 93, at 575 (discussing ways that public confidence in ALJs can be enhanced through education, training and explanations of the administrative process).

C. ALJ Independence and Morale

Another argument made in support of ALJ finality is that it protects ALJ independence.[112] ALJ finality obviously enhances ALJ independence because the only constraint on the ALJ's decision-making is judicial review. The argument, however, confuses the means with the end. The institutional independence of ALJs in central panels is a tool for improving administrative adjudication by eliminating the potential for improper agency influence. The goal of administrative adjudication, however, is not to give ALJs final order authority. This is true particularly when ALJ finality has significant detrimental impacts on one of the fundamental purposes of contested case adjudication, the ability of the agency to develop policy and enforce a consistent view of the statutory scheme.

Moreover, experienced ALJs have noted that central panels increase the desirability of the position because of much more tangible benefits. Central panels enhance the prestige of the ALJ, provide more prominence and visibility, and may lead to more uniform and perhaps enhanced pay, as well as opportunities for professional development.[113] Any potential increase in the attractiveness of the position from ALJ finality is minor in comparison with what central panels already have achieved for ALJs.

A related argument is that ALJ finality is necessary for their morale and job performance, because a broad scope of review by agencies, and the inevitable rejection of some ALJ's findings and decisions, undermines the incentive to perform complex adjudication. This argument requires an assumption about the work ethic of ALJs that is not true for other adjudicators, and is not true of ALJs. Review of an adjudicator's findings of fact is commonplace without any effect on judicial performance. The trial judge's decisions, including findings of fact, are reviewed de novo in equity cases in some states.[114] Federal magistrate judges[115] and bankruptcy judges are subject to de novo review by a federal district judge, but there are no reported reductions of judicial productivity in those areas.

A useful analysis of judicial incentives and review is found in the appellate treatment of decisions committed to the discretion of the trial judge. The appellate courts accord such decisions by the trial judge substantial deference and accept them although the appellate court may disagree with the result. Judicial morale has been rejected as a rationale for this deference to the trial

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112. Rossi, *Final Orders on Appeal*, *supra* note 2, at 6.

113. Several leading administrative law judges expressed this opinion at a symposium at which I was a panelist. The Program on Law and State Government Fellowship Symposium, *Maximizing Indiana Fairness & Efficiency: Should Indiana Consider Creating an Office of Administrative Hearings?*, *at* Indiana University School of Law—Indianapolis (Oct. 1, 2004).

114. *See e.g.*, OR. REV. STAT. § 19.415(3) (1999); Townes Assocs., Ltd. v. City of Greenville, 221 S.E.2d 773 (S.C. 1976).

115. 28 U.S.C. § 636(b)(1)(C) (2000).

judge because it does not identify which, of all of the decisions a trial judge makes, should be protected from searching review.[116] In effect, arguing that the trial judge's morale compels deference by the appellate court proves too much. The argument always compels deference without any review of the trial judge's decisions.

Appellate courts defer to the trial judge regarding procedural decisions in two situations. The first involves those decisions where the issue arises in such a variety of fact situations and involves a multifactor analysis such that guiding principles and rules cannot be articulated. Many trial decisions, particularly those involving the admission or exclusion of evidence, fall into this category. The second occurs when the trial judge, by virtue of his position in the courtroom, is in a better position to assess the facts than an appellate court reviewing a cold record.[117] Neither rationale for deferring to the trier of fact justifies the complete deference to ALJs and the elimination of agency review. The issues before the ALJ are not the type incapable of being guided by rules and principles, and the ALJ is not in any preferred position by reason of hearing the witnesses. Rather, the issues requiring agency review are primarily those of law, policy, and enforcement and are best made by the agency charged with developing policy and applying the statutory scheme.

D. ALJ Finality as a Mechanism of Agency Control

The Louisiana litigation may represent another facet in the relationship between agencies and other branches of state government. Conversations with ALJs suggest that some agencies are seen as resisting legitimate direction by the executive or legislative branches.[118] Professor Jim Rossi explained why state agencies may become independent power centers. He noted that state governments have special characteristics that influence the development of state administrative law and central panels. As compared to the federal system, state legislative sessions are shorter, staff resources are fewer and special interests more prominent. The state executive branch is weaker and has less power to develop policy than the President.[119] In a jurisdiction with a weak governor and a short legislative session, an agency with broad jurisdiction or important subject matter authority may be insulated from legitimate executive or legislative oversight by an independent political base. In this context, a central panel with ALJ finality becomes a legislative tool to counterbalance agency independence by transferring final adjudicative authority from the agency to the central panel ALJ.

ALJ finality also may be proposed as an expedient remedy for litigant

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116. Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 660-65 (1971).

117. *Id.*

118. This opinion was expressed by ALJs at the Central Panel Directors Conference held in Savannah, Georgia, on September 19, 2003 which I attended as a panelist.

119. Rossi, *Overcoming Parochialism*, *supra* note 2, at 557-59, 568-72.

frustration with agency adjudication. The literature discussing the adoption of versions of ALJ finality in North Carolina and Oregon often talks about leveling the playing field, which is another way of talking about curbing the agency's authority in an area of high visibility—administrative adjudication.

ALJ finality as a mechanism for controlling or restricting agency power or satisfying litigant frustration is not particularly effective and has all the disadvantage of using a sledge hammer as a fly swatter. If adopted as a general principle, as in Louisiana, it adversely affects all agencies regardless of their relationship to the executive and legislative branches, and seriously weakens any administrative enforcement mechanism. More important, ALJ finality is a negative and indirect means of forcing a more politically responsive agency. It reduces agency power in an unrelated area by creating an alternate power center in the central panel. Any perceived benefit from weakening the agency comes from the distractions created by the additional friction inherent in competing bodies.

Similarly, ALJ finality will not significantly change litigant frustration, which is based on the high agency success rate in contested cases. Changing the ultimate decisionmaker will not significantly affect this rate. ALJs in North Carolina decided in favor of the agency three quarters of the time before agency review. Thus, only a few cases will ultimately be different with ALJ finality. The real reason for litigant frustration is that agencies generally bring actions in which they are most likely to prevail. Only by changing the substantive law will litigants prevail more often in administrative adjudication. Even that is an indirect consequence. The more likely result is a reduction of agency actions. The agency will bring only actions that it can sustain before the central panel.

VI. ADAPTATIONS TO ALJ FINALITY

A. Presenting Policy in a Contested Case Before the ALJ

The major disadvantage of ALJ finality is the inevitable differences in policy and enforcement that occur when the agency is responsible for enforcement, but the final decision on any action is made by the ALJ.[120] This has occurred in the few federal agencies with split-enforcement models,[121] as well as the more recent experience in Louisiana, where the ALJ makes the final agency decision without any agency review. There are procedures for identifying important policy issues before the hearing.[122] Can the problem of inconsistent decision-making be

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120. Verkuil et al., *supra* note 3, at 1040.

121. *See, e.g.*, George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315 (1987); Sidney A. Shapiro & Thomas O. McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 YALE J. ON REG. 1, 59-62 (1989); Peter L. Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law*, 74 COLUM. L. REV. 1231, 1254-64 (1974).

122. *See, e.g.*, TEX. GOV'T CODE ANN. § 2001.058(c) (Vernon 2001) (requiring the agency to

addressed by having the agency present its policy during the contested case so that the final ALJ decision will incorporate the agency's policy and enforcement view? For several reasons, I do not believe so.

The belief that policy can be articulated in a contested case assumes that the agency can anticipate, before trial, the policy issues to be resolved, and their proper resolution. That may be true for repetitive, routine cases but it is not true for many significant cases and issues for two reasons. First, it assumes that the policy articulated by the staff in making the initial decision that led to the contested case is the same as the policy that the leadership would apply. Second, it assumes that the facts reviewed by the staff in making the decision are the same facts that the ALJ will hear and determine in the contested case. Neither is entirely accurate, and the more important the case, the more likely it is that these assumptions are not true.

The decisions that lead to contested cases initially are made by low and mid-level personnel who decide, in the normal course of business, to grant or deny a license or a permit, or take other administrative action affecting legal rights. The policy they apply at that time is based upon precedent and prior experience and is entirely retrospective. Established policy reflects the last, best judgment of the agency, but not necessarily what the leadership would apply in a new case.[123]

More difficult problems arise because information in administrative adjudication increases over time, and the agency does not possess all of the facts at the time of the initial decision. Obviously, the agency staff received some information from the applicant, and perhaps the agency, at the time of the initial decision. Prior to the final order in the contested case, however, this information is indefinite and incomplete. The information is indefinite because the facts have not been probed and proved in a trial-type proceeding, and are subject to qualification or modification by that process. The facts are incomplete because the information presented to the agency for its decision does not include all that is available to the applicant nor does it include any information or perspective from those, other than the applicant, who are affected by the decision and may intervene in the contested case. In many cases, the evidence presented in the contested case will be substantially more detailed and more recent than that evaluated by the agency.[124] To the extent that there are differences between what

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provide statement on applicable rules and policies); CAL. GOV'T CODE § 11425.60 (West Supp. 2000) (permitting an agency to designate precedential opinions for guidance to lawyers and ALJs).

123. Professor Daye's study of North Carolina agency review established that the agency reversed a small, but significant number of cases in which the agency had prevailed before the ALJ. Daye, *supra* note 1, at 1619 (displaying OAH Chart 5: Total Agency Rejections with Proportion for Petitioner and Agency; Inception Through 1999). One explanation for this action is that the agency leadership, on review of the ALJ's decision, disagreed with the position taken by the staff before the ALJ.

124. Rossi, *Problems with ALJ Finality*, *supra* note 11, at 71 (noting that parties are reluctant to present full case to agency); Marlboro Park Hosp. v. S.C. Dep't of Health & Envtl. Servs., 595 S.E.2d 851 (S.C. Ct. App. 2004) (holding that evidence presented at a contested case is not limited to that presented to the agency for initial decision).

was presented to the agency, and what was ultimately presented during the contested case, and recorded by the ALJ in the proposed order, there will be ambiguities in the policy to be applied.

Policy cannot be effectively changed in the middle of a contested case because facts must be established to understand the ramifications of the policy being applied. Any policy articulated before final decision is subject to alteration by the facts that eventually are found. Even assuming that the ambiguity in the facts can be overcome, policy is the province of the agency leadership, but typically, it is not involved in litigation because the volume precludes their active, in depth, participation at that time. The difficulty of matching the schedules of the leadership with the demands of the trial calendar preclude all but the rare occasion where the leadership can review the policy during the trial. The development of policy also demands time and careful consideration. The middle of a contested case, and the time pressures of a trial, make that the worst point to consider strategic changes in policy because there is neither the time to collect all relevant points of view, nor consider carefully their ramifications.

Moreover, policy is founded upon expertise. An understanding of the subject matter is a prerequisite to an understanding of rationale for selecting one option from among choices that otherwise appear reasonable. In the middle of the trial, not only are the facts unclear, but also the ALJ, as finder of fact, may not accept the testimony of the agency's experts, or may find that the applicant's views are better presented or more persuasive.[125] An ALJ with final authority may adopt his own view of the law and evidence, subject only to limited judicial review. With ALJ finality there is substantial uncertainty whether the policy articulated will be the policy accepted. The fundamental problem with presenting policy at the contested case is that it puts the proverbial policy cart before the factual horse. Requiring policy to be fully developed and articulated in the absence of a fixed set of facts is inconsistent with the general jurisprudential approach in our system that rejects the use of advisory opinions.[126]

B. Altering Judicial Standards of Review to Restore Agency Accountability

Professor Jim Rossi has noted that ALJ finality makes the ALJ independent but also creates a loss of agency accountability because law and policy decisions are made by the ALJ without agency review. This splits executive authority between the agency and the ALJ, raising constitutional concerns, although probably not a constitutional violation. He proposes that agency accountability can be restored by altering the judicial standards of review so that the courts give greater weight to the agency's positions on law and policy than those reached by the ALJ in rendering the final decision.[127]

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125. Bybee, *supra* note 1, at 460 (describing potential conflicts between agencies and ALJs).

126. Among the reasons arguing against an advisory opinion is that it ignores the importance that specific facts have on the ultimate resolution of the issue. Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002 (1924).

127. Rossi, *Problems with ALJ Finality*, *supra* note 11, at 64-66.

I certainly agree that a final ALJ decision is not entitled automatically to the deference traditionally accorded a final agency decision on the facts and the law. Judicial deference to the agency is based upon its expertise, as well as a sensitivity to separation of power concerns when the judiciary reviews executive agency decisions. Neither argument applies to ALJs with final order authority. ALJs, as generalists, often lack the expertise found in the collective knowledge of the agency. The separation of power concerns arising from the judicial review of executive agency action seems muted when those final decisions are made by an ALJ independent of the agency and the executive branch, albeit still a part of the executive branch for administrative purposes.

Jim Rossi suggests that the judicial review of facts found by the ALJ should be governed by the substantial evidence test, or the clearly erroneous test, if it does not introduce too much complexity. Fact-finding presents the greatest need for an independent ALJ and has the least need for political accountability by the agency.[128] I suggest an important qualification. The substantial evidence test is very deferential to the initial fact-finder whose facts must be accepted so long as there is any evidence in the record to support those facts, even though others might find a different conclusion more reasonable. The clearly erroneous test is not significantly more stringent.[129] Both tests are minimal standards of accountability that only determine whether a particular fact falls within a broad range that could be found or inferred from the record. Only facts without any support in the record are rejected by these tests.

I would limit the judicial deference to historical or empirical facts, or those dependent upon credibility determinations by the ALJ. The argument for deference is strongest for these categories because they rely on the strengths of the ALJ who is the person who heard and saw the witnesses. Oregon uses this approach to insulate ALJ fact-finding from agency review for similar reasons.[130] There is substantially less justification for deference to facts found by the ALJ that are derived from the application of expertise, the evaluation of expert testimony, or are mixed questions of law and fact where statutory interpretation and policy judgments play a significant role. Those facts should be subject to, at least, de novo review by the appellate courts. Otherwise, some determinations that can reasonably be classified as factual or credibility-dependent, such as the weight of expert testimony, may undermine the agency's policy role.

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128. *Id.* at 66-70.

129. William R. Andersen, *Judicial Review of State Administrative Action—Designing the Statutory Framework*, 44 ADMIN. L. REV. 523, 551-53 (1992). The Supreme Court held that the "clearly erroneous" test is less deferential to the lower court than the "substantial evidence" test, but noted that the difference between the tests was so subtle that no other court had found that the result would change if the other test were used. Dickinson v. Zurko, 527 U.S.150, 152-63 (1999). On remand, the Federal Circuit concluded that the outcome was not changed by applying the substantial evidence test rather than the clearly erroneous test. *In re* Zurko, 258 F.3d. 1379, 1381 (Fed. Cir. 2001). Likewise, Professor Rossi recognizes that the differences may not be significant in practice. Rossi, *Problems with ALJ Finality*, *supra* note 11, at 69-70.

130. 1999 OR. LAWS ch. 849 §§ 12(2), (3) (codified at OR. REV. STAT. § 183.650 (2003)).

The crux of Professor Rossi's proposal is found in his treatment of policy determinations made by the ALJ under final order authority. Here he looks to the theoretical distinction between the substantial evidence test and the clearly erroneous test. The former requires the reviewer to evaluate the lower tribunal's decision on the reasoning articulated by that court.[131] The clearly erroneous test, however, "requires a reviewing body to consider the lower tribunal's decision on the reviewing body's *own* reasoning."[132] The change of perspective is important. Rossi argues that when reviewing a final ALJ decision, the appellate court should not accept the ALJ's reasoning framework. Rather, the court should substitute the agency's framework for the ALJ's. The agency's framework is more important in defining the scope of the court's inquiry into policy decisions than the deference accorded the decision, and the agency's framework should not be "trumped" by an ALJ or any expert.[133] On questions of law, Rossi argues that, at the least, the reviewing court should give strong weight to the agency's interpretations of law and regulations regardless of how the ALJ decided the legal issue.[134]

Professor Rossi's proposal requires the reviewing court to evaluate the ALJ's final decision, including its views on law and policy, against the agency's policy and legal framework, rather than evaluate it from the ALJ's perspective. Presumably, the agency's reasoning framework, broadly speaking, is the agency's perspective and includes the predicates for its positions, the agency goals, its regulatory values, and their relative weight when they conflict, as articulated in the record and agency briefs. The court would review the ALJ's policy decision in the context of the agency's decision framework and apply the appropriate standard of review to determine whether the ALJ's policy decision was arbitrary and capricious, or clearly erroneous. When the ALJ's policy decision deviated substantially from the agency's, the court would be free to overturn it in favor of the agency's position. Making the agency's policy the gauge in reviewing the ALJ's policy decisions restores the agency's role in policy development, provides it an incentive to carefully articulate the policy in the contested case, and ultimately makes the agency accountable for the decisions made by the ALJ, even though there was no formal agency review of the ALJ's decision.

Professor Rossi recognizes the emerging reality of ALJ finality, and has sought to develop a way to counter one of the adverse consequences of ALJ finality, the loss of agency accountability. I support his effort but I have doubts that it will effectively accomplish its goal. Two main problems appear to me. First, any proposal that depends upon judicial review works only through the few cases that reach the appellate courts. Generally, the first appeal in state administrative law is to a trial court, and only subsequent appeals are to appellate courts that are likely to produce widely available written opinions.[135] While

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131. Rossi, *Problems with ALJ Finality*, *supra* note 11, at 68-69.

132. *Id.* at 68 (emphasis added).

133. *Id.* at 72-73.

134. *Id.* at 74.

135. *See* MODEL STATE ADMIN. PROCEDURE ACT § 5-104 (1981), 15 U.L.A. 5-104 (1990)

those cases may be the more important ones, they are likely to be too few to provide for a consistent and persistent articulation of any one agency's policy. Professor Daye's study of North Carolina appellate court decisions from its central panel over sixteen years reveals that there were 3470 administrative decisions made by central panel ALJs. Only 130 cases reached the appellate courts, of which eighty-four cases met his criteria for evaluation.[136] There are too few opportunities for a particular agency to correct or modify the ALJ's views on policy and legal issues. The appellate process, moreover, is particularly slow, and there may be months, if not years, before the appellate courts restore the agency's views.

At best, changing the standards of review will provide an opportunity in a few cases to reverse a particularly egregious deviation of policy. Such cases may stand for the general principle that agency policy should prevail, but these appellate proclamations will be so few that they will be only guideposts, and will not serve as an effective means of insuring that ALJs do follow the appropriate policy. The policy established by the ALJ will be dominant simply because few cases are appealed. Agency appeals of some cases are possible, but it is not practical or cost efficient to do so in every appropriate case.

The second problem with the proposal is that the reviewing court intervenes only if the ALJ's views on agency policy and law substantially deviate from that of the agency's reasoning framework. Again, few cases will present such a clear choice. More likely, the differences between the ALJ and the agency will be significant, but not so unreasonable as to compel the court to reject the ALJ's analysis and result. The agency will be in much the same situation as with pure ALJ finality. Certainly, different standards of review will provide the agency with another opportunity to articulate its views on law and policy, but ultimately the agency is dependent on the court accepting the agency's views.

Finally, there are other significant practical problems in altering standards of review of administrative action, particularly how the change will be made. Generally, standards of review of administrative action are established by statute, not by case law.[137] It is difficult to see how a legislature, having established ALJ finality, would subsequently reintroduce a significant agency role by altering the appellate standard of review. Similarly, the courts have little reason to alter their standards of review in favor of the agency in the face of a legislative preference

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(initial appeal to the trial court level). This is the procedure in North Carolina. ALJ decisions in Oregon are appealed to the intermediate appellate court, and South Carolina may adopt the same procedure.

136. Daye, *supra* note 1, at 1619. The eighty-four appellate cases in the study had four characteristics: (1) a recommended decision by the ALJ; (2) the agency either accepted or rejected the ALJ's decision; (3) the case was appealed to the superior court; and (4) the case was then appealed to the court of appeals.

137. See the standards of judicial review in the MODEL STATE ADMIN. PROCEDURE ACT § 5-104, 15 U.L.A. 5-104, which many states have adopted; *see also* 5 U.S.C. § 706 (2000) (federal standards of judicial review).

for ALJ finality, and a diminished agency role.[138] Of course, this assumes that the change in the standards will be meaningful. While subtle distinctions can be advanced for different formulations, it is not clear that they actually produce significant differences in the results.

In the end, the change of the standards of appellate review affects too few cases to have any meaningful effect for a particular agency on the cumulative impact of all of the ALJ decisions reached without that agency's review. While the proposal provides a respectful ear at the appellate level, the agency remains dependent on two independent actors, the ALJ and the courts, for its views on law and policy to be enforced. This tenuous method of recognizing the agency's position creates sufficient justification for the agency to legitimately disavow responsibility for the law as independently articulated by the ALJ, and infrequently reviewed, and more infrequently reversed, by the courts.

C. ALJ Finality After a Program by Program Analysis

Another option, perhaps the best one, is to consider ALJ finality in the context of specific programs and specific contested issues. There are clear disadvantages to ALJ finality as a general proposition of administrative adjudication. Eliminating all agency review inevitably leads to inconsistent decisions between the agency and the ALJs, and among ALJs who hear similar cases, with a corresponding dissipation of the regulatory effort, and the loss of agency expertise and political accountability.[139] At the same time, ALJ finality helps to allocate scarce adjudication resources. State administrative law is characterized by a vast range of contested cases from the most complex multiparty environmental matters to simple hunting license revocations. ALJ finality may be appropriate for some types of cases. Recent history shows that some states have adopted it for a few programs, and agencies have relinquished their review authority for some matters.

The factors to be considered in making this decision are those that emphasize the strengths of the ALJ and at the same time, eliminate or moderate the adverse consequences of ALJ finality to the agency. The ALJ's strengths are in providing procedural regularity, evaluating factual evidence, resolving conflicting evidence, and determining credibility. The agency's contributions are its subject matter expertise, institutional experience with those regulated, and authority to make policy. The best cases for ALJ finality are those requiring

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138. Addressing this point on the context of ALJ finality, the Louisiana Supreme Court stated:

> Essentially the legislature has chosen to allow the ALJs to adjudicate, and in some cases to finally adjudicate, various matters concerning the insurance industry in this state and to reduce the Commissioner's ability to regulate insurance by prohibiting him from overriding the ALJ's decision or order and from seeking judicial review of an adverse decision or order. While we recognize that one may question the wisdom of this decision, it is within the legislature's prerogative to make this change.

Wooley v. State Farm Fire & Cas. Ins. Co., 893 So.2d 746,769-70 (La. 2005).

139. Flanagan, *supra* note 3, at 1399-1411.

determination of well defined issues of historical fact (but not subject matter expertise), perhaps involving credibility determinations, where the ALJ applies (but does not make) established policies to those facts.[140]

Driving license cases are one example of this class of cases and some central panels have final order authority over them. Wyoming's ALJs have the authority by statute,[141] and Maryland's ALJs obtained it by agreement with the agency.[142] Similarly, South Carolina's Administrative Court has final order authority over appeals of hunting and fishing licence revocations, among other matters.[143] These, and comparable cases, are primarily fact determinations of recurring enforcement scenarios where policy issues have long been identified and resolved through regulation and precedent. These cases do not have any significant need for agency review because they are unlikely to raise or to require the development or modification of agency policy. Agency review provides little additional benefits after a hearing before the ALJ and may delay any judicial review.

Conversely, the archetypal case for agency review involves multiparty litigation over issues dependent upon expertise that may require the development or modification of policy to accommodate the circumstances of the case. Often in these cases, the information improves over time. The agency staff may have received information from the applicant. In a contested case, however, interveners and other parties provide a different perspective or more recent or additional information to the ALJ. When the ALJ has received more evidence than was initially presented to the agency, review is appropriate for the agency to consider the implications of the more expanded record.

Identification of an appropriate class of cases for ALJ finality is not the only issue. In addition to policy development, agency review provides an opportunity for the agency to achieve a consistent application of the law in similarly situated cases. ALJ finality may generate inconsistent decisions when a single agency's cases are decided by several ALJs. The Social Security Administration is an extreme example, where some ALJs award benefits in only twenty-five percent of cases they hear and others consistently award benefits in seventy-five percent of their cases.[144] A system of adjudication which suggests that the outcome is

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140. Asimow, *supra* note 32, at 1109 (noting that agency review is costly, time consuming, and it may be unnecessary when the issues are factual and unimportant in terms of policy and impact on the regulatory program). *Cf.* Michael Asimow, *Speed Bumps on the Road to Administrative Law Reform in California and Pennsylvania*, 8 WIDENER J. PUB. L. 229, 261-62 (1999) (noting that central panels work best in cases that are relatively nontechnical, limited to two parties, present credibility conflicts and do not call for specialized knowledge).

141. WYO. STAT. ANN. § 31-7-105(b) (Michie 1999) (driver's licenses). ALJ final authority has existed since at least 1986 and in licensing cases since at least 1977.

142. E-mail from Hon. John W. Hardwicke, former Chief Administrative Law Judge of Maryland, to author (Aug. 11, 2004, 16:22:31 EDT) (on file with author).

143. S.C. ADMIN. LAW JUDGE DIV., ANNUAL REPORT 1999-2000, *supra* note 35, at 10.

144. Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 77 FLA. ST. U. L.

dependent upon the particular trier of fact creates problems of the perception of fairness as well as due process. Some method of addressing this issue is necessary. A formal appellate procedure within the central panel is one solution but creates the same concerns about the speed and efficiency of agency review. Another approach is to attempt to achieve quality control within the panel. That, however, is likely to be strongly resisted by ALJs as an improper interference with their decisional independence.

CONCLUSION

We are at a midpoint in the evolution of central panels and ALJ finality. Central panels have proven themselves. ALJ finality is more problematic. At most, it can be an exception to the general rule of agency review, adopted on a case-by-case basis for selected adjudications. Any decision to adopt it requires a careful balancing of the advantages and disadvantages, including the institutional considerations and the effects on the litigants and the agency.

REV. 199, 283-84 (1990).

EXECUTIVE BRANCH ADJUDICATIONS IN PUBLIC SAFETY LAWS: ASSESSING THE COSTS AND IDENTIFYING THE BENEFITS OF ALJ UTILIZATION IN PUBLIC SAFETY LEGISLATION

CHRISTOPHER B. MCNEIL*

> It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[1]
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> —Oliver Wendell Holmes, Jr.

I. INTRODUCTION AND PREMISES

Among the powers of the legislative branch is the power to create inferior courts.[2] In the exercise of this power, Congress not only establishes courts of the judicial branch, but also from time to time invests in the executive branch the power to adjudicate a wide range of issues, including many that are closely related to public safety. In this process of delegation, the legislative branch cedes to the executive branch real judicial power: it transfers to the executive branch not only the *authority* to adjudicate, but also the *responsibility* to ensure fair treatment of all whose cases are brought to the forum. This delegation, in turn, is replicated throughout the nation in state and local governments, forming a complex fourth branch of government that is heavily dependent upon public trust

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1. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 5 (Mark DeWolfe Howe ed., Harvard University Press 1963) (1881), *quoted in* JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW 2-3 (5th ed. 2002).

2. U.S. CONST. art. III, § 1.

and confidence in the abilities of the executive branch adjudicators to provide a fair hearing to all participants.

In the aftermath of the attacks on the United States on September 11, 2001 ("9/11"), the executive and legislative branches of government have begun to reevaluate how to better protect the public. Through legislative initiatives like the USA PATRIOT Act[3] and the Homeland Security Act,[4] and through executive orders and regulatory changes, the federal government has begun the process of examining weaknesses in our public safety systems, and has inspired like action in state and local governments nationwide. Inevitably, with these reassessments will come a need for innovations in the manner by which governments treat those responsible for making threats to our public safety, and to those who may be accused of making such threats.

This Article examines changes in executive adjudication, primarily at the state level, in the wake of the attacks of 9/11. It takes as its first premise the idea that lawmakers have reacted to the attacks by transferring substantial judicial power to the executive branch, in order to grant to the executive (Governor or President) additional resources to preempt threats to our national security, at all levels of government. Through an examination of federal and state legislation implemented in reaction to the attacks, the Article proposes that this genre of legislation recognizes that the administrative and executive power of government can be an effective and very efficient means of providing prompt and meaningful process in legislative schemes designed to provide homeland security.

Its second premise is that while the executive branch is capable of providing all process that is due (and then some), among the various administrative law systems there are significant differences in the amount of protection these systems provide against governmental overreaching. Executive adjudication systems like the central panel of administrative law judges, for example, vary widely in key components—such as the level of independence attributed to the adjudicator and the institutional structure used to provide adjudicative services. This Article suggests that these variations may make a significant difference in public confidence in the administrative law system, particularly where citizens are required to surrender long-held constitutional protections, such as those guarding against unwarranted searches and seizures, the ability to confront one's accusers, and access to an impartial adjudicator when faced with threats to protected liberty or property interests.

The third premise of the Article is intertwined with its goal: in order for lawmakers to craft effective adjudication measures that use the executive branch as adjudicator, care must be taken to select those administrative systems that foster public confidence while still serving the administration effectively and efficiently. Threats to public safety in the United States must be addressed at all stages: in advance of the threat, during any emergent situation, and after the fact.

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3. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered titles and sections of the U.S.C.) [hereinafter USA PATRIOT Act].

4. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified in scattered sections of 6 U.S.C.) [hereinafter Homeland Security Act of 2002].

At each stage administrative processes will play an ever-increasingly important role in law enforcement and homeland security. Striking a proper balance between individual liberty and public safety will require that lawmakers identify the administrative processes most likely to win public support. That balance will be achieved only by carefully crafting highly responsive and adaptive administrative adjudication systems designed to ensure prompt and effective hearings in a manner consistent with our national legacy of affording due process to all.

II. RETOOLING ADJUDICATIVE ROLES IN THE WAKE OF 9/11

Shortly after the terrorist attacks against the United States on 9/11, lawmakers throughout the country responded by examining a wide range of public safety systems. Their search was intended to detect weaknesses in threat detection, border insecurity, and any number of public safety systems that were weak enough to allow enemy assailants into the United States. Government surveillance tools were sharpened and executive authority to gather information was exponentially expanded through the USA PATRIOT Act. Border security, immigration, transportation regulation, and banking quickly became the focus of measures designed to enhance our nation's security infrastructure. At the state and local level, lawmakers quickly enacted legislation designed to provide for public safety in the event of additional attacks, while at the same time enacting legislation complementary to the federal legislative initiatives.

In these schemes, there is a conscious and deliberate effort to shift both decision-making and fact-finding power to the executive branch. This shift makes sense: the executive branch has long been entrusted with decision-making powers, and administrative process anticipates that the exercise of such powers should, generally, be conducted through an open and adversarial process, such as through "some kind of hearing."[5]

A. Identification of Judicial Power in the Executive Branch

Because the tools used most by these executive branch decision-making offices are also used in the judicial process—including notice of charges, an opportunity to be heard, the right to have counsel present, etc.—the process is characterized as quasi-judicial. As the Supreme Court observed in the context of proceedings under the federal Administrative Procedure Act,

> [t]here can be little doubt that the role of the modern federal hearing examiner or administrative law judge within this framework is "functionally comparable" to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions.[6]

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5. Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1267 (1975) (quoting Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974)).

6. Butz v. Economou, 438 U.S. 478, 513 (1978) (citing 5 U.S.C. § 556(c) (1976)).

But true judicial power is not so freely granted; indeed, such power is intended to be largely confined, subject to restraint in the form of the requirements of separate functions of government from executive, to legislative, to judicial. While Congress has the power to create inferior courts and make judicial appointments, the Constitution imposes important limits to such power. By limiting this power, the Framers "could ensure that those who wielded it were accountable to political force and the will of the people."[7] This power of appointment is necessarily concentrated, as a means of preserving the democratic force necessary to a three-part government: "The Appointments Clause prevents Congress from distributing power too widely by limiting the actors in whom Congress may vest the power to appoint. The Clause reflects our Framers' conclusion that widely distributed appointment power subverts democratic government."[8]

Thus, we see that when Congress delegates to the executive branch a judicial power, it must do so cognizant of the need to maintain accountability through the democratic process. In *Freytag v. Commissioner*, the Court examined the creation of the United States Tax Court,[9] which permitted the court's Chief Judge to appoint inferior "special trial judges." Against a challenge that the assignment of complex tax cases to such a judge violated the Appointments Clause of the Constitution,[10] the Court observed that the power delegated by Congress to this court was indeed judicial: "Our cases involving non-Article III tribunals have held that these courts exercise the judicial power of the United States."[11] Unlike typical administrative adjudicative bodies, however, the Tax Court's "exclusively judicial role distinguishes it from other non-Article III tribunals that perform multiple functions and provides the limit on the diffusion of appointment power that the Constitution demands."[12] The Tax Court's decisions are reviewed by the court of appeals and not, as in the case of appeals taken under the federal Administrative Procedure Act (APA), by the district court, and are subject to a standard of review different from that applicable under the APA: the court of appeals reviews Tax Court decisions "in the same manner and to the same extent as decisions of the district court in civil actions tried without a jury."[13]

Freytag makes clear that a key component of congressional delegation of judicial authority is whether the authority granted is judicial in nature. The Court explained this power thus: "[t]he Tax Court exercises judicial, rather than executive, legislative, or administrative power. It was established by Congress to interpret and apply the Internal Revenue Code in disputes between taxpayers and the Government. By resolving these disputes, the court exercises a portion

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7. Freytag v. Comm'r, 501 U.S. 868, 884 (1991).

8. *Id.* at 885.

9. Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 487, 730 (codified as amended at 26 U.S.C. § 7441 (1988)).

10. U.S. CONST. art. II, § 2, cl. 2.

11. *Freytag*, 501 U.S. at 889.

12. *Id.* at 892.

13. 26 U.S.C. § 7482(a)(1) (2000).

of the judicial power of the United States."[14] Noted also is the absence of any competing role: it is "neither advocate nor rulemaker. As an adjudicative body, it construes statutes passed by Congress and regulations promulgated by the Internal Revenue Service. It does not make political decisions."[15] Thus, we know that in the exercise of these decision-making powers, a process is judicial in nature if it resolves disputes between the government and the governed by construing applicable authorities through an adjudicative process that is structurally separated from roles of advocacy or rulemaking.

B. The "Judicial" Nature of Post-9/11 Delegations

Drawing upon the definition of judicial power from *Freytag*, the legislative initiatives taken after 9/11 warrant some study. Notably, have lawmakers transferred judicial power to the executive branch in an effort to strengthen the hand of the executive officer? Has Congress given the President power to engage in a deliberative and adjudicative process that until this point was within the province of the judicial branch? And if so, have appropriate checks and balances been built into the new structures to provide for the integrity of the newly configured adjudication systems?

The abrogation of a judicial role in favor of a role by the executive branch is unmistakable in Military Order of November 11, 2001, Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism ("the Order").[16] By this Order, the President "suspend[ed] the rights of indictment, trial by jury, appellate relief and habeas corpus for all non-citizen persons accused of aiding or abetting terrorists."[17] The Order anticipates the creation of military commissions that will try suspected terrorists, and only the Secretary of Defense will sit in review of the final decisions of these commissions.[18] Similarly, in the USA PATRIOT Act, the Attorney General is directed to take into custody "any alien that he has 'reasonable grounds to believe' is 'engaged in any other activity that endangers the national security of the United States.'"[19] Instead of using established immigration procedures, "[i]f an immigrant is detained for purposes related to immigration under this provision, there is no statutory or constitutional authority to control the length of the detention. This has frequently resulted in the indefinite detention of non-resident foreigners in U.S. detention facilities and prisons with no remedy."[20]

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14. *Freytag*, 501 U.S. at 890-91.

15. *Id.* at 891.

16. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) [hereinafter Detention of Non-Citizens].

17. John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA PATRIOT Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081, 1118 (2002).

18. *Id.* at 1119 (citing Detention of Non-Citizens, *supra* note 16, at 57,836).

19. *Id.* at 1126 (citing USA PATRIOT Act § 412, 8 U.S.C. § 1226a (Supp. II 2002)).

20. *Id.* at 1127.

Perhaps more closely akin to traditional administrative process, the Attorney General has the authority under the USA PATRIOT Act to seize assets without due process, upon determining that the property belongs to someone whom the Attorney General determines "has planned, authorized, aided, or engaged in such hostilities or attacks against the United States."[21] This authority, according to the Attorney General, is designed to permit the government to "follow the money," and to do "more than a freeze. We must be able to seize."[22] The statute's terms "do not grant judicial review for these seizures, and any judicial review of a determination based on classified information will be conducted ex parte."[23]

C. State-Based Legislation in Response to 9/11

Largely following the lead of the Homeland Security Act,[24] states have taken legislative action focusing on information and infrastructure protection, transportation security, science and technology, and emergency response. According to Professor O'Reilly, each state has laws in effect for civil defense and emergency preparedness, and all but three as of 2002 were participants (to varying degrees) in the Emergency Management Assistance Compact ("EMAC").[25] The EMAC is an interstate compact designed to provide the means for states to share resources and information in time of emergency, "whether arising from natural disaster, technological hazard, man-made disaster, civil emergency aspects of resources shortages, community disorders, insurgency, or enemy attack."[26] Basing its actions upon legislative findings that there is a need for "intergovernmental planning and programming at the state level," shortly after the attacks of 9/11, the District of Columbia, for example, joined the forty-eight states that are now members of the EMAC.[27]

Law enforcement schemes were broadly reexamined by the states in the aftermath of the attacks, with a particular eye towards public safety enforcement programs. Minnesota Commissioner of Public Safety, Rich Stanek, summarized that state's efforts to address gaps in the regulation of transportation and licensing that seemed to contribute to shortfalls in homeland security. Commissioner Stanek identified licensing weaknesses which surfaced after the attacks:

> In the weeks and months before September 11, local law enforcement in various states had contact with several of the hijackers. Unfortunately,

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21. USA PATRIOT Act, § 106, 50 U.S.C.A. § 1702(a)(1)(C) (West 2002).

22. Whitehead & Aden, *supra* note 17, at 1128 (quoting *Homeland Defense Before the Senate Comm. on the Judiciary*, 107th Cong. (2001)) (written testimony of the Hon. John Ashcroft, Attorney General)).

23. *Id.* (citing USA PATRIOT Act § 106, 50 U.S.C.A. § 1702(c)).

24. Jonathan Thessin, *Recent Development, Department of Homeland Security*, 40 HARV. J. ON LEGIS. 513, 513 (2003).

25. James T. O'Reilly, *Planning for the Unthinkable: Environmental Disaster Planning in an Age of Terroristic Threats*, 9 WIDENER L. SYMP. J. 261, 270 (2003).

26. Emergency Management Assistance Compact, Pub. L. No. 104-321, § 1, 110 Stat. 3877, 3877 (1996).

27. D.C. CODE ANN. §§ 7-2331, 7-2332 (2001).

law enforcement did not know whom they were dealing with because of a failure to use technology. Consider the following three examples:

(1) In July 2001, Mohammed Atta, considered the leader of the September 11 hijackers, was stopped by police in Tamarac, Florida, and ticketed for an invalid license. Atta ignored the ticket and a bench warrant was issued for his arrest. When Atta was stopped again for speeding a few weeks later in a nearby town, neither his warrant nor the fact that he was on a CIA "watch list" came up on the police officer's squad car computer. Atta was released with only a warning.

(2) In August 2001, Hani Hanjour, who was aboard the airliner that crashed into the Pentagon, was stopped for going 50 miles per hour in a 30 miles-per-hour zone. Police released Hanjour with only a traffic ticket because they did not know he had entered the United States on a student visa, failed to provide INS officials with a valid address, and never actually attended any classes.

(3) Just two days before the September 11 attacks, Ziad Samir Jarrah, believed to have piloted the airplane that crashed into the field in Pennsylvania, was pulled over by Maryland state troopers for going 90 miles per hour in a 65 miles-per-hour zone. Jarrah gave officers a valid driver's license but with an invalid address. Again, the police officer did not know that Jarrah was on a CIA watch list. The officer simply let the eventual terrorist go on his way. After September 11, the car that Jarrah was driving was found parked at the Newark, New Jersey, airport. Jarrah's speeding ticket was still in the glove compartment.[28]

The adjudicative tasks relevant to these three examples, including the adjudication of minor traffic citations, frequently fall to administrative law judges. Even before 9/11, state traffic schemes ceded to the executive branch fact-finding responsibilities over minor traffic cases. Given the ubiquity of administrative processes affecting driver licensing, it would seem inescapable that administrative adjudicators will at some point be responsible for making initial findings of fact concerning the rights of drivers who may come under increased scrutiny based on post-9/11 legislation. If, as Commissioner Stanek writes, "[i]nformation is the most valuable weapon the United States can possess in the War on Terrorism,"[29] then it would seem likely that at one or more points in the processing of such information an executive branch adjudicator will be among those who are responsible to appreciate the import of such information.

In another example, improving communication among adjudicators in sister states is a large part of the goal of the Driver License Compact (DLC) and Nonresident Violator Compact (NRVC), which are agreements between the states to promote highway safety by sharing and transmitting driver and conviction information.[30] These acts, like the EMAC, recognize state and local

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28. Rich Stanek, *Essay on Terrorism: Minnesota Responds to the Clear and Present Danger*, 29 WM. MITCHELL L. REV. 739, 741-42 (2003).

29. *Id.* at 742.

30. *See, e.g.*, OHIO REV. CODE ANN. § 4510.61 (Anderson 2004) (driver license compact) and

responsibilities in information sharing, responsibilities that would have proved highly relevant in responding to the kind of threats posed by the three suspected terrorists described by Commissioner Stanek.

In addition to enacting legislation that recognizes the need to cooperate among sister states, many states have enacted laws recognizing the innovations wrought by the Homeland Security Act.[31] For example, Colorado recently enacted legislation that requires its Office of Preparedness, Security and Fire Safety to "create and implement terrorism preparedness plans."[32] Among several legislative changes made in the wake of 9/11, New York made it a crime to engage in "money laundering in support of terrorism."[33] Vermont recently enacted legislation to

> provide the state with tools to protect it and its citizens against terrorism, to allow Vermont to cooperate with other states and the federal government to prevent acts of terrorism, and to achieve these goals without infringing upon the constitutional and civil rights which make both our nation and our state so worth defending.[34]

Louisiana responded by investing additional power not only in the Governor, but also locally with the parish presidents. Louisiana Revised Statute § 29:722 (2004), designates the state military department as the state's homeland security and emergency preparedness agency and authorizes the creation of local organizations for emergency preparedness. This confers upon "the Governor and upon the parish presidents the emergency powers provided in this chapter" to "reduce vulnerability of people and communities of this state to damage, injury, and loss of life and property resulting from natural or man-made catastrophes, riots, acts of terrorism, or hostile military or paramilitary actions" and to require coordination of these efforts with those of the federal government and other state governments and "private agencies of every type."[35]

Perhaps the most patent example of post-9/11 legislation having the potential to give rise to executive branch adjudication responsibilities is from Nevada, where the legislature "refocused attention on the importance of domestic preparedness for acts of terrorism and related emergencies," enacting legislation that would protect against cyber-terrorism, energy, telecommunications and water infrastructures, continuity of government, inter-governmental communication among first responders, government identification cards, and statewide coordination.[36]

OHIO REV. CODE ANN. § 4510.71 (Anderson 2004) (nonresident violator compact).

31. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified in scattered sections of 6 U.S.C.).

32. COLO. REV. STAT. § 24-33.5-1604 (2003).

33. N.Y. PENAL LAW § 470.21 (Consol. 2004).

34. VT. STAT. ANN. tit. 13, § 3501 (West 2004).

35. LA. REV. STAT. ANN. § 29:722 (Lexis 2004).

36. NEV. REV. STAT. 239C.010 (2004).

D. Characteristics of Legislative Reform

Each of the foregoing legislative schemes crafted in response to 9/11 have the potential for adjudicative action. If we accept as a threshold the standard imposed by constitutional jurisprudence, then a hearing will be required whenever the governmental action falls within the state's administrative procedure act, or the action has the potential to adversely affect a liberty or property interest. Less troubling of the two is the instance where legislation expressly provides for review by existing administrative adjudicators. In such cases, the path for redress against threats to liberty or property interests is at least well marked—typically the state's administrative procedure act articulates the procedures to be used and the interests to be protected. More difficult is when a legislative scheme calls for governmental action but is silent with respect to whether executive branch adjudication is to be provided.

To make a determination of whether some kind of hearing is required, we need to recall that the Due Process Clause (as applied to the states through the Fourteenth Amendment) applies only to individualized decisionmaking and only when the governmental action threatens a deprivation of a property or liberty interest.[37] "The limitation that the Due Process Clause only applies to individualized decisionmaking dates back to . . . the early 1900s. The Court has continued the distinction between individualized deprivations of property or liberty, which require due process, and policy-based deprivations affecting a class of individuals, which do not."[38] The power to quarantine, for example, may be exercised in such a manner as to not give rise to due process interests, unless it amounts to individualized decisionmaking.[39]

Assuming the governmental interest involves individualized decision-making, the core question at the outset is whether the legislation adversely affects a property or liberty interest. The Supreme Court stated in *Roth* that "[p]roperty interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[40] Upon a claimed violation of a property right, the claimant must "have more than an abstract need or desire" for the benefit, and must have "more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."[41] A liberty interest, on the other hand,

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37. *See* WILLIAM FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE 250-56 (2d ed. 2001).

38. *Id.* at 251 (citing Londoner v. Denver, 210 U.S. 373 (1908); Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915)).

39. *See* Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 IDAHO L. REV. 273, 331-32 (1994); *but see* State *ex rel.* McBride v. Superior Court for King County, 174 P. 973 (Wash. 1918) (individual subject to quarantine granted habeas corpus hearing).

40. Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972).

41. *Id.* at 577.

> denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[42]

Thus, a liberty interest is found in an array of governmental action, including actual restraint on freedom, as in the case where the Attorney General proposes to detain aliens,[43] and when the state highway patrol administers a breathalyser/sobriety test as a result of a roadside stop.[44]

Emerging as perhaps the broadest of executive powers are those powers intended to respond to threats to public health. Also developed in the wake of 9/11, the Model State Emergency Health Powers Act (the "Model Act")[45] proposes state-level responses to emergency health threats, "including those caused by bioterrorism and epidemics."[46] This model act calls for comprehensive planning at the state level, for responding to public health emergencies, and "grants specific emergency powers to state governors and public health authorities."[47] It identifies executive responsibilities for early detection of health emergencies and investigation through enhanced access to private medical records; it authorizes and regulates the "care, treatment, and housing of patients, and [the destruction of] contaminated facilities or materials"; and empowers the executive to "provide care, testing and treatment, and vaccination to persons who are ill or who have been exposed to a contagious disease, and to separate affected individuals from the population at large to interrupt disease transmission."[48] By its own terms, the Model Act recognizes the need to balance individual interests against the common good, by providing "state and local officials with the ability to prevent, detect, manage, and contain emergency health threats without unduly interfering with civil rights and liberties."[49]

These emergent legislative schemes all invest in the executive branch a level of decision-making authority expressly aimed at determining individual liberty

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42. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

43. Zadvydas v. Davis, 533 U.S. 678, 696 (2001) (regarding an alien's liberty interest in challenging indefinite and potentially permanent detention).

44. Mackey v. Montrym, 443 U.S. 1 (1979) (applying the *Mathews* due process analysis for deprivation of liberty interests after refusal to participate in alcohol-related breath testing).

45. The Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities, THE MODEL STATE EMERGENCY HEALTH POWERS ACT (2001 Draft), *reprinted in* J.L. MED. & ETHICS 324 (2002) [hereinafter MSEHPA].

46. *Id.* at 328, pmbl.

47. *Id.*

48. *Id.*

49. *Id.*

and property rights. Not all expressly provide, however, for administrative process, or for any kind of hearing. As a result, governmental decisionmakers and those who find themselves subject to public safety laws may need to anticipate the role of executive adjudicators in these emergent schemes: we need to determine when a hearing will be necessary, and whether the executive branch adjudicator should be used as the initial finder of facts.

E. Adjudication Responsibilities of the Executive Branch in Public Safety Cases

Given the ubiquity of agency actions and the firmly entrenched role of executive adjudication in so many public safety programs, it makes sense to recognize the adjudication responsibilities attendant to such a role. Certainly not all executive public safety schemes will include a fact-finding process, but when they do and when the process implicates those liberty or property interests protected by the state or federal constitutions, care must be taken to give effect to the relevant procedural protections.

When employed to preside over a fact-finding proceeding, the executive adjudicator simultaneously must promote the agency's role in implementing policy while serving as the principal protector of the participants' due process rights. Unlike the judicial branch adjudicator, who is a generalist and not a specialist, "the administrative law judge and the agency heads (together with their staff) are familiar with technical issues and equipped to draw specialized inferences based on their experience."[50] The specialist adjudicator presides over a fact-finding process that, too, is specialized and possesses its own formalities. Most notable in the administrative process is the expectation that decisions by the adjudicator will be reduced to writing, with findings of fact and conclusions of law articulated in the decision-making process. The executive adjudication is modeled after judicial branch evidentiary process, but there are some significant distinctions:

> Judges characteristically approach the question of how much process is due in terms of the extent to which an administrative proceeding must adopt the panoply of procedural formalities that are found in court trials. Judge Friendly, in his very useful article, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267 (1975) listed the following ingredients of judicial due process: (1) an unbiased tribunal; (2) notice of the proposed action and the grounds asserted for it; (3) opportunity to present reasons why the proposed action should not be taken; (4) the right to present evidence, including the right to call witnesses; (5) the right to know opposing evidence; (6) the right to cross-examine adverse witnesses; (7) [a] decision based exclusively on the evidence presented; (8) right to

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50. STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 743 (5th ed. 2002).

> counsel; (9) requirement that the tribunal prepare a record of the evidence presented; and (10) requirement that the tribunal prepare written findings of fact and reasons for its decision.[51]

These are the core characteristics of executive branch fact-finding processes, and by their very nature they permit a substantial diversity of approaches and procedures. Applied to emerging legislative schemes enforcing public safety laws, this core group of characteristics will serve to guide lawmakers, providing a set of structural minimum requirements for any executive adjudication system that might emerge in the wake of 9/11.

III. Calculating Costs and Benefits in Administrative Proceedings

When it engages in fact-finding in an administrative proceeding, the executive branch uses many of the tools traditionally employed by courts, including cross-examination, control over the introduction of evidence, and established burdens of proof, among other judicial tools. Unlike courts of the judicial branch, however, the executive adjudicator is by definition and design not independent of the executive branch. Also, unlike the trial court judge, who most often is a generalist, the executive adjudicator is usually a specialist, chosen for her or his expertise in one or more complex disciplines administered by the agency. Further, unlike the trial court process, there is no system of adjudication by peers through a jury; rather, the agency model provides for adjudication through appointed decision-makers, fact-finders who are by experience and training familiar with the relevant science, regulatory scheme, benefit program, or technology at hand. Further, unlike the jurist who attains his or her judicial position through political appointment or direct popular election, the executive adjudicator may have secured his or her position simply by filing a well-timed application with an agency in need, and may from that point forward be insulated from meaningful public accountability through the protections of civil service or collective bargaining.

Thus, there are both costs and benefits that adhere to using the executive adjudicator in public safety cases that involve fact-finding adjudications. One immediate and self-evident benefit inuring to the executive officer (i.e., to the Governor or President) is that the executive is empowered to directly select fact-finders, and—depending on how ALJ appointments are made—need not seek approval of the appointment from the judiciary, the legislature, or the public. There is no uniform set of credentials an executive branch adjudicator must possess, not even training in the law is required. This allows for some flexibility in the appointment of persons who can serve as adjudicators. The executive is able to appoint persons who are likely to accomplish the policy aims of the executive officer without being limited to lawyer applicants.

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51. *Id.* at 830-31 (internal footnote omitted).

A. The Costs and Benefits of Using Executive Adjudicators: Flexibility and Adaptability

One benefit of appointment flexibility is that candidates for the position of executive adjudicator may be more thoroughly possessed of knowledge of the programs being administered, at least when compared with candidates whose key credential is a license to practice law.

The cost of this benefit, however, is that the successful candidate may be wholly unfamiliar with the historical context of due process rights as applied in the adjudication setting. A substantial amount of legal training during law school is dedicated to teaching the historical and theoretical concepts that are relevant to administrative hearings, including due process, equal protection, procedural fairness, and the use of evidence in adversarial and inquisitorial proceedings. If a program opts to hire non-attorneys as ALJs or hearing examiners, the adjudicator may be wholly lacking in an understanding of these complex aspects of adjudication. Further, when the adjudicator is required to be licensed to practice law, the public is assured that in his or her dealings as an adjudicator, the ALJ or examiner will conform to not less than the minimum levels of professionalism, ethics, and efficiency required of lawyers in that jurisdiction.

The unlicensed adjudicator, on the other hand, may stand to suffer no consequence if he or she engages in action that would be considered unprofessional if attributed to a licensed attorney. Instead of a code of professional responsibility, the unlicensed adjudicator might be subject only to state civil service rules, and then only if those rules are fairly precisely drawn to include the practice of agency adjudication.

Another benefit (at least from the perspective of the executive officer) of utilizing executive branch adjudicators is the fact that the adjudicator is not wholly independent of the executive branch, but is instead part of that branch of government. Whereas a judicial branch judge is free to (indeed is expected to) interpret law and policy independent of the view espoused by the agency, the ALJ is merely required to apply the law as interpreted by the agency.[52]

B. Independence vs. Impartiality of Executive Branch Adjudicators— the Due Process Question

Few subjects engender more spirited debate than the question of ALJ independence, and with good reason: to the extent the ALJ is viewed as a means for implementing policy through adjudication, the executive officer can correctly insist that the adjudicator's conclusions of law and policy not be independently arrived at, but must instead be drawn from the agency's point of view. As one court explained when upholding a peer-review system against a claim that such a system interfered with Social Security ALJs' decisional independence:

> Policies designed to insure a reasonable degree of uniformity among ALJ

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52. *See* Nash v. Bowen, 869 F.2d 675, 680 (2d Cir. 1989) ("Policies designed to insure a reasonable degree of uniformity among ALJ decisions are not only within the bounds of legitimate agency supervision but are to be encouraged.").

> decisions are not only within the bounds of legitimate agency supervision but are to be encouraged. . . . It is, after all, the Secretary who ultimately is authorized to make final decisions in benefit cases. An ALJ is a creature of statute and, as such, is subordinate to the Secretary in matters of policy and interpretation of law. Thus, the Secretary's efforts through peer review to ensure that ALJ decisions conformed with his interpretation of relevant law and policy were permissible so long as such efforts did not directly interfere with "live" decisions (unless in accordance with the usual administrative review performed by the Appeals Council). The efforts complained of in this case for promoting quality and efficiency do not infringe upon ALJs' decisional independence.[53]

Thus, it is a misstatement of law to posit that due process requires that the ALJ be insulated from policy directives or free to ignore the construction of law espoused by the agency he or she serves. Not surprisingly, however, rank and file ALJs tend to take issue with any claim that the agency interpretation of controlling law must be adopted by the adjudicator. Consider what one state ALJ wrote about judicial independence of the executive branch adjudicator:

> One of the central tenets of our legal system is the due process concept that decision-makers must be independent, in order that they can be neutral and impartial in their decisions. They must avoid, and should be shielded as much as possible from, any influences that might in any way compromise such independence, neutrality and impartiality—in order that every person . . . can receive equal justice based on the law and not on preconceived notions or improper influences.[54]

Here the claim is that a "central tenet" of due process is that all decision-makers must be independent, yet for executive branch adjudications there is no authority for this proposition, rendering its validity as a "central tenet" suspect if applied to ALJs.

1. The Dependent Nature of Administrative Adjudicators.—To the contrary, the Supreme Court has clearly endorsed the use of executive branch decisionmakers who were wholly *dependent* upon the agencies they serve, and in some instances even dependent upon the private industries involved in the regulatory scheme, as long as the adjudicators were unbiased. For example, the Court in *Schweiker v. McClure* upheld a practice of reimbursing hearing officers employed by private insurers for reviewing Medicare claims as agents of the U.S. Department of Health and Human Services, even though the hearing officers were employees of the private carriers.[55] Due process did indeed play a significant role in the Court's decision, but it did so with respect to bias of the adjudicator, not the adjudicator's independence.

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53. *Id.* (citations omitted).

54. Ann Marshall Young, *Evaluation of Administrative Law Judges: Premises, Means, and Ends*, 17 J. NAT'L ASS'N OF ADMIN. L. JUDGES 1, 24 (1997).

55. Schweiker v. McClure, 456 U.S. 188, 195 (1982).

In *Schweiker*, the Court did not support the assertion that all decisionmakers must be independent nor that they must be shielded from influences that may compromise their independence: "The hearing officers involved in this case serve in a quasi-judicial capacity, similar in many respects to that of administrative law judges. As this Court repeatedly has recognized, due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities."[56] The Court thus recognized these adjudicators as serving in the same quasi-judicial role as that of ALJs, but it then rejected the notion that these hearing officers needed to be independent of the agencies they served or were disqualified due to their close ties to the carriers: "Due Process is flexible and calls for such procedural protections as the particular situation demands."[57] Rejecting claims that the dependent relationship between the agency and the adjudicator violated the Due Process Clause, the Court wrote that "appellees adduced no evidence to support their assertion that, for reasons of psychology, institutional loyalty, or carrier coercion, hearing officers would be reluctant to differ with carrier determinations. Such assertions require substantiation before they can provide a foundation for invalidating an Act of Congress."[58] The Court considered the appellee's claims of the need for an independent executive adjudicator, and then rejected those claims

> in light of the strong presumption in favor of the validity of congressional action and consistently with this Court's recognition of "congressional solicitude for fair procedure" . . . [and held that] Appellees simply have not shown that the procedures prescribed by Congress and the Secretary are not fair or that different or additional procedures would reduce the risk of erroneous deprivation of . . . benefits.[59]

Schweiker has repeatedly been cited as authority supporting the proposition that in administrative adjudications, the executive adjudicator need be neither independent nor insulated from agency direction or control.[60]

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56. *Id.* at 200 (quoting Morrisey v. Brewer, 408 U.S. 471, 481 (1972)).

57. *Id.*

58. *Id.* at 197 n.10.

59. *Id.* at 200 (quoting Califano v. Yamasaki, 442 U.S. 682, 693 (1979)).

60. *See* Ferreras v. Ashcroft, 160 F. Supp. 2d 617, 633 (S.D. N.Y. 2001) (quoting Bertrand v. Sava, 684 F.2d 204, 212-13 (2d Cir. 1982) (In immigration proceedings: "[T]he Attorney General's exercise of his broad discretionary power [to release unadmitted aliens under 8 U.S.C. § 1182(d)(5)] must be viewed at the outset as presumptively legitimate and bona fide in the absence of strong proof to the contrary."); D'Amato v. Apfel, No. 00Civ. 3048 (JSM), 2001 U.S. Dist. LEXIS 9459, at *15-16 (S.D. N.Y. July 10, 2001) (quoting *Schweiker*, 456 U.S. at 195) (citations omitted) (In proceedings before the Social Security Administration: "The Commissioner acknowledges that due process requires an impartial decision-maker in administrative proceedings. However, there is a presumption of honesty and integrity in those who serve as adjudicators for administrative proceedings. Furthermore, this presumption of integrity can be overcome only by 'a showing of conflict of interest or some other specific reason for disqualification.'").

2. The Accountability of Administrative Adjudicators.—Not only may the executive officer retain close ties to the agency adjudicator, because the executive officer and the agency head are both publicly accountable for proper implementation of legislative policy, either also may reject conclusions of policy and law offered by the adjudicator if the adjudicator fails to conform to the interpretation of the law as expressed through the agency head or the executive officer. As one commentator observed, in the context of hearings conducted under the federal APA:

> The top officials of an agency are appointed to make, to interpret, and to apply policy choices, and they are held accountable for their actions in various forums. The agencies, with strong judicial backing, have read the somewhat equivocal provisions of the APA to maintain this broad grant of authority and its corresponding accountability. Specifically, the Act has been construed to permit the agency heads to reverse determinations of hearing examiners relatively freely. Because the APA bars contact and consultation only with the trial staff during intra-agency review, the heads of agencies still may use other members of their staffs to make final decisions. Most agencies with large adjudicatory loads maintain special opinion-writing sections not institutionally separate from the agency heads for this purpose. The result has been final actions with little consideration of the hearing examiner's recommendations or of anything else that went on at the trial level.[61]

Thus, the opinion-writing staff of an agency may be wholly separate from and sit in review of the agency adjudicator, able to reject or modify the legal constructions expressed by the ALJ or hearing examiner. This process is warranted because ultimately it is the agency head (and his or her President or Governor) who must account to the people for the agency's judgment.

Considered in the context of state-based executive adjudications in public safety cases, the diminished independence of ALJs is reflected in the decision of the New Hampshire Supreme Court in *Asmussen v. Commissioner, New Hampshire Department of Safety.*[62] Asmussen was a state hearings examiner whose docket included cases involving the state department of safety, including cases involving driver challenges to administrative license suspensions arising out of citations for driving while under the influence.[63] By statute the department's assistant commissioner had ultimate supervisory authority over the bureau of hearings, which employed Asmussen. The assistant commissioner was concerned that hearings examiners were "conducting hearings . . . with the formalities of a court proceeding, and that police officers were losing cases on technical grounds."[64] The assistant commissioner met with the hearings examiners

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61. William F. Pedersen, Jr., *The Decline of Separation of Functions in Regulatory Agencies*, 64 VA. L. REV. 991, 1005-06 (1978) (citations omitted).

62. 766 A.2d 678 (N.H. 2000).

63. *Id.* at 685.

64. *Id.*

(including Asmussen), and "instructed them not 'to act like judges' and not to conduct hearings as if they were courtroom trials."[65] He specifically instructed the examiners to admit hearsay and directed that the rules of evidence would not apply to administrative license suspension hearings, adding that the examiners

> were not to dismiss hearings automatically on technical grounds such as failure of the police officer to state that the road where the driver was arrested was a public way. Rather, they were to reopen the hearing first and allow the police officer an opportunity to introduce the required proof. Moreover, they were instructed to ask questions to develop the evidence and assist the officer in meeting his or her burden of proof.[66]

These and other directions were communicated both during the assistant commissioner's meeting with the examiners and through a memo issued after the meeting. The directives, not surprisingly, concerned the examiners, and some allegedly communicated about the directives ex parte with members of the defense bar. The assistant commissioner then held another meeting and informed the examiners "that if they could not carry out department policies, they could resign, but they could not undermine the policies."[67] The examiners apparently were effective in conveying to the defense bar their concerns about these directives, because several defendants facing administrative license suspensions filed a joint petition seeking declaratory relief in voiding the terms of the directive.[68]

Drawing upon language in the New Hampshire Constitution that "it is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit,"[69] the court first confirmed that this language applies to hearings examiners acting as "quasi-judicial officers."[70] Further, the court noted the state's constitution "mandates . . . an independent judiciary so that the adjudication of individual controversies is fair and remains uninfluenced by outside forces."[71] However, the court distinguished hearing examiners from judges, reflecting upon the hearing examiners' duty to engage in policy-making:

> Thus, the principal issue raised on appeal is the extent to which the assistant commissioner may exercise supervisory authority in a manner that affects the independence of quasi-judicial hearing examiners. "A judge is a member of a separate and independent branch of government, bound only to decide cases in accordance with the constitution and laws of New Hampshire and of the United States." The hearings examiners in this case, by contrast, are employees of the department of safety, an executive branch agency, and their "impartiality" must be considered

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65. *Id.*
66. *Id.* (citation omitted).
67. *Id.* at 686.
68. *Id.*
69. *Id.* at 692 (quoting N.H. CONST. art. 35).
70. *Id.*
71. *Id.* (quoting Petition of Mone, 719 A.2d 626, 633 (N.H. 1998)).

> within the context of the policy-making responsibility that officials of the agency, including the assistant commissioner, hold.[72]

Specifically, the court recognized that in the act of policy-making the executive officer may indeed express an interpretation of the law, and that interpretation of law is binding on the examiners:

> On issues of policy and legal interpretation, hearings examiners are subject to the direction of the agency by which they are employed, and their independence is accordingly qualified. Influence ordinarily is not deemed improper unless it is aimed at affecting the outcome of a particular proceeding. Thus, the assistant commissioner's "efforts . . . to ensure that [the hearing examiners'] decisions conformed with his interpretation of relevant law and policy were permissible so long as such efforts did not directly interfere with 'live' decisions."[73]

C. Implicit in the Balance: The Integrity of ALJs

This is not to argue that the legal analysis of ALJs and hearing examiners should be dismissed as unimportant. To the contrary, the analysis is a critical part of the adjudicative process and should reflect the highest level of intellectual and judicial processing—it is the heart of the administrative process, and if it lacks integrity and credibility the process will fail for want of public support.[74] What it does suggest, however, is that the adjudicator must recognize the significance of agency interpretation of law and policy. In the absence of such recognition, both the agency and the public at large are left unsure of whether the adjudicator is actually applying institutional doctrine or is, instead, pursuing policies that suit his or her personal views but arbitrarily contradict the agency's interpretation of the law.

In sum, the benefits of executive adjudication include the ability to employ a highly flexible workforce of persons familiar with factually complex and technically-driven governmental programs; the ability to delegate to this workforce responsibility for finding facts through an adversarial or inquisitorial process; the ability to require uniform application of law and policy to adjudicated facts; and the ability to dissolve the workforce after the exigent circumstances requiring such adjudication passes. The costs associated with these benefits include a diminution of the degree of decisional independence possessed by the finder of fact with respect to issues of law, accompanied by the possibility that the public will feel disenfranchised or deprived of an independent (and thus presumably unbiased) adjudicator.

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72. *Id.* (quoting Appeal of Seacost Anti Pollution League, 482 A.2d 509, 517 (N.H. 1984) (Brock, J., concurring specially)).

73. *Id.* at 692-93 (internal citation omitted) (quoting Nash v. Bowen, 869 F.2d 675, 680 (2d Cir. 1989)).

74. *See* Christopher B. McNeil, *Critical Factors of Adjudication: Language and the Adjudication Process in Executive and Judicial Branch Decisions*, 23 J. NAT'L ASS'N OF ADMIN. L. JUDGES 411, 412-13 (2003).

D. Executive-Judicial Collaboration: Judicial Branch Supervision of Administrative Process

Because it is not the product of an independent analysis but is instead the result of applying agency policy to impartially determined facts, an executive branch adjudication merits special handling when presented to the judicial branch, once the agency's role is at an end. Judicial branch adjudicators are obliged to take into account that the proceedings at the agency level may have included evidence that would have been inadmissible in proceedings conducted under the state's rules of civil procedure and rules of evidence. Courts likewise need to recognize the role of the judicial branch in serving as a check against statutory and regulatory schemes that violate constitutional rights—a role unavailable to most agencies, whose adjudicators do not generally have the power to invalidate either statutes or regulations no matter how patently unlawful. Judicial review of agency action after an administrative hearing is frequently the first opportunity afforded to litigants who seek an independent assessment of the constitutional validity of agency action. Nevertheless, the review by courts is subject to significant restraint, amounting to deference by courts to agency construction of both fact and law.

Applied in the context of responding to terrorist threats or action, judicial review of agency decisionmaking could quite plausibly be severely tested. Challenges to quarantine orders based on the deployment of biological weapons, for example, or challenges to decisions imposing mass restrictions on travel based on reports of breaches of national or state security, or challenges to agency action based on intelligence gathered under the auspices of the Homeland Security Act and USA PATRIOT Act (and their state-based correlatives) could easily strain our judicial system beyond its known limits. If these challenges must first be raised in an administrative forum, then the role of courts becomes even more vital, and the need for inter-branch collaboration becomes profound.

Goldberg v. Kelly[75] confirmed that the judicial branch is fully equipped to address the ways and means of distributing justice through agency adjudication. Indeed, *Goldberg* presents a similar query, involving not threats to public safety but threats to sustenance and support for millions of persons in desperate need of financial and social welfare benefits. Where *Goldberg* describes the process required for the government to terminate public assistance payments to a particular recipient,[76] the threat of terroristic action will require courts to determine the process required when the state or federal government proposes to restrict travel or access to medical support, financial resources, information, or even to the courts.

Key to this collaboration between the judicial and executive branch is the degree to which the courts will defer to the executive adjudicator, both with respect to factual findings and with respect to applicable law. Guided by

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75. 397 U.S. 254 (1970).

76. *Id.* at 261, 266-67.

Chevron[77] we know a number of tests may be invoked to determine how much deference courts should give to agency adjudication. Indeed, the diversity of approaches available to courts in reviewing agency action suggests (at least at the federal level) the lack of a cohesive body of law applicable to the process of judicial review of agency action.[78]

Despite the array of approaches available to courts in the exercise of judicial review over agency adjudication, such review will likely be of significant importance in serving as a check over impermissibly broad use of executive adjudicative power. Telling is the Court's construction of the Authorization for Use of Military Force resolution (AUMF),[79] which authorized the President to use "all necessary and appropriate force" against persons associated with the 9/11 attacks.[80] In *Hamdi v. Rumsfeld*,[81] the Court examined the suspension of the writ of habeas corpus with respect to an individual who allegedly was a United States citizen captured in Afghanistan and transported to a United States Navy facility in Virginia. Although the Court was unable to agree on an opinion, it held by two different majorities that the AUMF provided the executive branch with some authority to detain United States citizens as enemy combatants, but in doing so the detainee had a right to an administrative hearing that would afford him or her at least an opportunity to present evidence that he or she was not an enemy combatant.[82] The Court held that "although Congress authorized detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that determination before a neutral decisionmaker."[83]

In *Hamdi*, the detainee presented his claim before an Article III court, seeking relief under 28 U.S.C. § 2241, which the Supreme Court found to allow "some opportunity to present and rebut facts" and retains in courts "some ability to vary the ways in which they do so as mandated by due process."[84] Here the government argued against the courts having any role, asserting that "'[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict'

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77. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (concerning the deference afforded to agency interpretation of its own regulations); *see also* United States v. Mead, 533 U.S. 218 (2001) (concerning an agency's summary rulings); Christensen v. Harris County, 529 U.S. 576 (2000) (concerning an agency's interpretive rules and summary rulings); Skidmore v. Swift & Co., 323 U.S. 134 (1944) (concerning an agency's interpretive rules).

78. *See* RICHARD J. PIERCE JR. ET AL., ADMINISTRATIVE LAW AND PROCESS 390 (4th ed. 2004) ("The Court has addressed the scope of *Chevron* issue several times since *Mead*, but its subsequent opinions merely illustrate the murky nature of the *Mead* test and the continued existence of widely differing views among the Justices.").

79. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

80. *Id.* § 2.

81. 124 S. Ct. 2633 (2004).

82. *Id.* at 2635.

83. *Id.*

84. *Id.* at 2644.

ought to eliminate entirely any individual process, restricting the courts to investigating only whether legal authorization exists for the broader detention scheme."[85] The Government argued that the courts should accept factual claims without exercising judicial power: "[u]nder this review, a court would assume the accuracy of the government's articulated basis for . . . detention . . . and assess only whether that articulated basis was a legitimate one."[86]

Recognizing that this case involved the "tension that often exists between the autonomy that the Government asserts is necessary in order to pursue effectively a particular goal and the process that a citizen contends he is due before he is deprived of a constitutional right,"[87] the Court applied traditional due process doctrine and evaluated the need to assess "'the risk of an erroneous deprivation' of the private interest if the process were reduced and the 'probable value, if any, of additional or substitute safeguards.'"[88] Thus, even in the context of executive action to detain a person suspected of enemy combatant status, administrative process is warranted, for "the risk of erroneous deprivation of a citizen's liberty in the absence of sufficient process here is very real."[89] In this way the Court makes plain the judiciary's role in serving as a check on executive branch adjudication, here in the context of enemy combatant status:

> In so holding, we necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.[90]

Thus, even in an environment charged with extreme threats to public safety, there is a familiar role for the courts which employs traditional due process tools to protect against overreaching by the government. Despite the exigent circumstances attendant to the "war on terror," the decision-making process employed by the government in *Hamdi* nonetheless is subject to traditional due process measures, including meaningful oversight of the executive decision-making process by the independent judiciary.

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85. *Id.* at 2645 (citing Brief for Respondents at 26).

86. *Id.*

87. *Id.* at 2646.

88. *Id.* (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

89. *Id.* at 2647 (noting the Brief for AmeriCares et al. as *Amici Curiae*, at 13-22, which states that "[t]he nature of humanitarian relief work and journalism present a significant risk of mistaken military detentions").

90. *Id.* at 2650 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952)).

IV. STRUCTURING EXECUTIVE BRANCH ADJUDICATIONS TO MEET THE DEMANDS OF A POST-9/11 WORLD

A. Alternative Approaches in Executive Branch Adjudication

Not all administrative adjudication schemes are alike, and their differences can be of importance when crafting systems designed to meet emergent public safety needs. Furthermore, one cannot help but believe the beleaguered Assistant Commissioner of the New Hampshire Department of Public Safety in *Asmussen* would have preferred not to have rampant hostility directed toward his attempts at achieving a unified corps of qualified and effective hearings examiners.[91] If experience and logic suggest a more effective and efficient means of producing a cadre of ALJs or hearing examiners for use in times of emergent threats to public safety, it perhaps makes sense to recommend that lawmakers choose those options most likely to achieve the desired effect, while endeavoring to avoid those approaches that seem to guarantee a hostile reaction by the incumbent adjudicators.

A review of current case law and literature suggests that a set of structural variables exist that may be of particular importance to lawmakers when creating a public health or safety-related administrative adjudication scheme. The first variable is global, focusing on the institution in which the adjudicator operates, distinguishing between internally employed or appointed adjudicators and those employed by a central panel of adjudicators who are part of the executive branch of government but are not actually employed by the agencies for which they hear cases. The other is a set of subordinate variables that include controls over ex parte communication, training of the adjudicator, the weight to be given by the agency to the ALJ's decision, and the scope of judicial review in the appeal of the agency's final order. The impact of these subordinate variables changes depending on whether the adjudicator is internally placed or is part of a central panel.

1. The Importance of Structure: Appointment of the Executive Adjudicator in Public Safety Adjudication Schemes.—When facing the need to create an adjudicative scheme that might be well-suited to use adjudicators from the executive branch, lawmakers first must delegate fact-finding authority and then must determine who will wield that authority (or leave that determination to the executive branch itself). The menu of options has grown substantially since the 1940s and the emergence of the modern administrative state. At one end of the spectrum, the adjudicator may be the very person appointed by the Governor or President, and may sit in judgment without benefit of any form of further delegation. Because this approach generally is impractical (and particularly so in the case of safety-related adjudications like those involving driver licensing, health and safety permitting, and other high-volume administrative adjudications), there more often than not will be some delegation to an examiner or ALJ. The question then becomes to what degree should the agency control the adjudicator?

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91. *See supra* text accompanying notes 62-73.

Drawing an example from the federal scheme, ALJs who are employed under the provisions of the federal Administrative Procedure Act are part of the agencies they serve, but enjoy insulation from agency influence to some degree, because their terms of employment are prescribed by the U.S. Office of Personnel Management independently of agency recommendations or ratings.[92] In addition, ALJs under the federal APA are exempt from the performance ratings prescribed for other civil servants, and, also unlike most federal civil servants, ALJs under the APA have tenure without first having to go through a probationary period,[93] and cannot be removed without a formal adjudication.[94] The lack of traditional evaluative tools diminishes the ALJ's accountability to the public and to his or her employer, leading to the potential for abuse by the ALJ against the agency or the public. This is perhaps more of a concern where the affected party to a governmental scheme is weak or powerless due to economic or social status.[95]

In an effort to explore and quantify the relationship between the executive adjudicator and the agencies served by them, the Administrative Conference of the United States (ACUS) in 1992 commissioned the first significant national survey of administrative law judges since the 1981 overhaul of the APA.[96] This survey provided the most comprehensive set of data on ALJ utilization to date. Lending credence to the concerns associated with the lack of ALJ accountability under the APA, Professor Koch noted:

> From my participation with the ACUS Study Group, I perceive that the problems involve the failure of an unacceptable number of presiding officials, particularly those in the privileged position of ALJ, to perform their function fairly and with an acceptable level of competence and diligence. As with any large group, there are poor performances and failures of integrity. Unlike other groups, those responsible for the failures here are insulated from criticism. Aggravating the situation is the fact that the individuals most often adversely affected are already very disadvantaged people. We must find a way to monitor the presiding officials so that these individuals are not subjected to breakdowns in the administrative process.[97]

Professor Koch was specifically referring to ALJs from the Social Security Administration as it existed in 1992.[98] There appears to be no similar survey conducted since 1992, so it is not possible to determine whether these concerns continue to pose a threat to the integrity of the administrative process. Koch notes further that one very significant participant in the administrative adjudication process was not surveyed at all: the litigants (and their attorneys).

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92. 5 U.S.C. § 5372 (2000).

93. *See* 5 C.F.R. § 930.211 (2004).

94. *See* 5 U.S.C. § 554.

95. Charles H. Koch, Jr., *Administrative Presiding Officials Today*, 46 ADMIN. L. REV. 271, 272 (1994).

96. *Id.* at 275-77.

97. *Id.* at 272.

98. *Id.* at 271.

This was particularly lamentable, in Koch's view, because he and others involved in the ACUS study "received enough information from other sources to suggest a need to inquire" into the views of those who appear before ALJs.[99] His recommendation that the interests of those whose fortunes are presented to the executive adjudicator should be studied seems to be as appropriate in 2004 as it was in 1992. In Koch's view, "the system does not do enough to assure that the administrative judiciary will be sensitive to those who appear before it."[100] Indeed, one of the recommendations presented later in this Article addresses the want of current information and suggests that new data be gathered to better acquaint lawmakers with accurate information about ALJ effectiveness and accountability, and that such data include reports on participant reaction to the process.[101]

2. The Tangible Adverse Consequences of Adjudicator Insulation: Lack of Accountability.—This level of insulation from agency control has produced some telling results. Federal agencies, where possible, avoid using ALJs, and in their place have installed a less well-insulated adjudicator, now generally referred to as an administrative judge, or AJ.[102] In reporting on the results of the ACUS survey, Professor Koch described the key differences experienced by ALJs and AJs in the early 1990s, differences that shed some light on the practical realities of executive branch adjudication in the federal system.[103] Although AJs to this point had not been the subject of any formal studies, by 1992 their ranks in the federal system had swelled to 2700, in contrast to approximately 1150 ALJs,[104] suggesting widespread agency interest in avoiding the use of highly insulated ALJs.

Unlike ALJs, AJs are not covered by the APA provisions regulating ALJs and do not attain the tenure status enjoyed by ALJs.[105] The ACUS study surveyed both ALJs and AJs, gathering data about the adjudicators' perceptions about potential challenges to their independence, asking whether the adjudicators ever were asked to do things that "are against their better judgment," whether they were subject to "too close supervision," and whether they were satisfied with their jobs, among other questions.[106] Despite having less employment security and structural independence,[107] the AJs reported less interference with the performance of their jobs,[108] less anxiety about supervision,[109] and greater levels

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99. *Id.* at 295.

100. *Id.*

101. *See infra* Part IV.C.

102. Professor Koch credits John H. Frye III with coining the term. *See* Koch, *supra* note 95, at 276 & n.23.

103. *Id.* at 276.

104. *Id.*

105. *Id.* at 278.

106. *Id.* at 277-82.

107. *Id.* at 278.

108. *Id.* at 278 & nn.40-42.

109. *Id.* at 278 & n.39.

of job satisfaction[110] than did the ALJs, leading Koch to conclude:

> First, the tension over performance management, here as elsewhere, is inevitable, but this kind of management is more often accepted by presiding officials than some assert. Second, here, as elsewhere, the outward manifestations of this tension are very individualized and must be met with mechanisms that can offer individualized solutions. Third, the structural and formalized solutions are not as effective as less formal approaches.[111]

Twelve years have passed since this survey was taken, and the exponential growth of the administrative state is reason enough to both call for the gathering of new data and to recommend the 1992 data be viewed with some reserve. Nevertheless, based on what we now know about the role of the executive adjudicator, when applied in the context of creating adjudication schemes for public safety cases at the state level, the data discussed by Professor Koch suggests that the structure of the adjudication system may be less important than the means by which individual ALJ concerns about decisional integrity are handled.

Protecting the adjudicator from overreaching by the administrative head—long a goal of Social Security ALJs—seems less pressing a need than ensuring each adjudicator has an effective means of airing his or her employment-related grievances while extending the same kind of protection to those who appear in front of the adjudicator. If our courts repeatedly affirm the proposition that ALJs and hearing examiners are bound to follow the interpretation of law as prescribed by the agency heads, then the agency head is not overreaching when he or she insists the executive adjudicator abide by agency interpretation of the law. If what the ALJ really wants are improvements in job-related benefits like better working hours, safer working locations, a superior parking pass or similar prerequisites of the job, then Koch's suggestion makes even more sense: he specifically recommends maintaining an ombudsman to "not only protect the public from the presiding officials but also [to] protect the presiding officials from oppressive agency management."[112]

The 1992 ACUS study went beyond questions of adjudicator independence, however, and examined a countervailing point: the ability of the structure to "assure that the presiding officials are faithful" to the choices made by those possessing the power to make policy.[113] According to Koch, "[a]gencies increasingly complain that some presiding officials consistently ignore agency policy choices."[114] The concern was borne out in the ACUS data, where according to Koch, "while the ALJs considered themselves bound by agency regulation, they did not feel constrained by less formal expressions of policy."[115]

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110. *Id.* at 278 & n.68.
111. *Id.* at 281.
112. *Id.* at 275.
113. *Id.* at 282.
114. *Id.*
115. *Id.* at 284.

This attitude was of some concern to Koch:

> The failure to heed official public statements of policy violates the presiding officials' own view that they should not engage in policymaking. More importantly, as the agency is bound by nonlegislative policy pronouncements, so too are its adjudicators (unlike judges). That is, if they ignore the agency statements of policy, not only are the adjudicators arrogating to themselves a policymaking function but they are violating the law.[116]

As Koch noted, given the willingness of ALJs to disregard the expressions of agency policy, the agencies have a legitimate need to monitor the ALJs' faithfulness to agency policies, but that need has to be met through "a mechanism for assuring policy integrity without creating the appearance of interfering in individual determinations."[117]

B. Executive Adjudicators: The Internal Model, the Itinerant Contractor, and the Central Panel

As noted above, the ACUS study examined two kinds of executive adjudicators: the ALJ—a well-defined position expressly provided for by the federal APA, and the AJ—an evolving alternative to the more insulated and less accountable ALJ. Other mechanisms for employing executive adjudicators do indeed exist, however, and should be considered by lawmakers when creating a program that employs executive adjudicators.

1. The Agency's In-House Adjudicator.—At one end of the spectrum is the in-house ALJ, i.e., the full-time employee of the agency, whose job description may be limited to hearing agency cases, or may expand beyond that, so that he or she hears agency cases but does so as one of many incidents of employment. Professor Rossi describes this as an "internal" model:

> [T]he 'internal' model views the ALJ as operating entirely within the agency. For example, if a regulatory matter involves an investigation and decision to prosecute, when a hearing is requested under . . . [this model], an ALJ within the agency decides the relevant issues of fact and—at least in instances where ALJs are more than mere record-compilers—law. Following issuance of the ALJ's decision, the agency head is given an opportunity to review the ALJ's findings of fact and law. The agency head takes the final agency action or the action can be appealed and reviewed by a court. So, in applying the internal model, a reviewing court evaluates the agency head's reaction to an agency ALJ. The agency may have accepted the ALJ's order or allowed the time for rejecting or modifying the ALJ's order to pass, but the agency has the opportunity to reject or modify the ALJ's proposed findings of fact and law.[118]

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116. *Id.* (citations omitted).

117. *Id.*

118. Jim Rossi, *Final, But Often Fallible: Recognizing Problems With ALJ Finality*, 56 ADMIN. L. REV. 53, 56 (2004).

For example, the Ohio State Medical Board has such an arrangement,[119] albeit with non-statutory provisions for separately housing and managing the adjudicator staff to remove the opportunity for hearing examiners to be involved in either the prosecution or investigation of charges. A key advantage to maintaining in-house adjudicators is their increased level of familiarity with the agency's programs and policies. Under this system, however, participants who take the trouble to find out such things will learn that their judge in licensure proceedings before the Board is an employee of the Board, which may in turn give rise to concerns about fundamental fairness, where the judge is subject to supervision by the very agency that made the decision to investigate and then prosecuted the cause.

2. The Agency's Itinerant Adjudicator.—A variant of the internal model, one that retains with the agency the power to specifically name the person who will serve as adjudicator in a given case, is the contract adjudicator model. Under this approach, the agency solicits invitations to qualified persons—either lawyers or not—to serve as agency adjudicators either on a case by case basis, or on a regular, repeating basis. This approach allows the agency to seek out attorneys or others who are familiar with agency programs and who have the skills needed to preside over evidentiary hearings. The use of itinerant contract-based adjudicators allows agencies to keep overhead costs down and, in jurisdictions where it is permissible, allows the agency to hand-pick its adjudicators based on the exigent circumstances attendant to the case at hand. In those states where an alternative centralized panel of full-time adjudicators is available, however, resorting to an ad hoc selection of an adjudicator, if coupled with a potential for additional service as the need arises, may trigger a successful due process claim against the agency.[120]

As with internal employee-adjudicators, the decisions rendered by an itinerant adjudicator will likely be presented as a recommendation and not a final order.[121] The agency thus preserves its ability to accept, modify or reject findings of fact and conclusions of law, and in this way retains public accountability for its final orders. The cost associated with this approach is like that associated with Professor Rossi's internal model; public confidence may be shaken if claims against the adjudicator's impartiality are made based on the contractual ties between the adjudicator and the agency.

3. The Governor's Central Panel.—Perhaps the most highly evolved means for implementing a legislative scheme that delegates fact-finding authority to the executive branch is the central panel—a stand-alone entity that supplies agencies with well-trained and qualified administrative adjudicators who are not part of the agency. Something of a novelty in the early 1980s when seven states had central

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119. *See* OHIO REV. CODE ANN. § 4731.23 (Anderson 2004); OHIO ADMIN. CODE ANN. § 4731-13-03 (Anderson 2004).

120. *See, e.g.*, Haas v. County of San Bernardino, 45 P.3d 280 (Cal. 2002).

121. *See, e.g.*, OHIO REV. CODE ANN. §§ 119.07 and 119.09 (Anderson 2004) (prescribing a hearing examiner's report that is presented to the agency head for approval, modification, or rejection).

panels, their use spread after substantial revisions to the Model State Administrative Procedure Act were completed in 1981, such that by 1996 eighteen states had central panels.[122] Professor Flanagan now reports that, twenty-five states and three large cities operate under central panel systems.[123] He also provided us with a definition: "A central panel of ALJs is a cadre of professional adjudicators who are administratively independent of the agencies whose cases they hear, and thus, they are removed from agency influence."[124]

The curb appeal of central panels is fairly obvious: litigants have their cases decided by someone who is not actually employed by the agency, resulting in a presumptively more fair hearing by a presumptively more independent adjudicator. The concept has its detractors. Professor Koch, for example, considered the shift to a central panel to be an "idea [that] goes in exactly the wrong direction" because it "further insulates the presiding officers from public scrutiny and solidifies the closed club environment" and it fails to confront what Koch saw as "the real problem."[125] It would "destroy the fundamental advantages of having expert decision-makers experienced with specialized processes."[126] Agencies too may resist the trend, if only to preserve their ability to implement policy through the adjudication process, with the least amount of risk that an externally appointed adjudicator would misunderstand or misapply that policy.

C. Evaluating the Merits of Central Panel Adjudication in Public Safety Cases

While an extensive comparison of the central panel variants is beyond the scope of this Article, general observations may be of some use to lawmakers when considering whether to delegate fact-finding authority to the executive branch in response to increased threats to public safety. First, executive control over the fact-finding process increases as the discretion whether or not to use an adjudicator from a central panel decreases. In plain English, if a governor can require cases to be heard through a central panel adjudicator, his or her control over the process increases—but it does so at the expense of control by the individual agencies served.

For example, in Ohio, where there is no central panel, there are over three hundred state agencies, most of which have the power to adjudicate and make findings of fact.[127] In its present decentralized state, the governor has

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122. Christopher B. McNeil, *The Model Act Creating a State Central Hearing Agency: Promises, Practical Problems, and a Proposal for Change*, 53 ADMIN. L. REV. 475, 486 (2001).

123. *See* James F. Flanagan, *An Update on Developments in Central Panels and ALJ Final Order Authority*, 38 IND. L. REV. 401, 403-04 nn.13-15 (2005).

124. James F. Flanagan, *Redefining the Role of the State Administrative Law Judge: Central Panels and Their Impact on State ALJ Authority and Standards of Agency Review*, 54 ADMIN. L. REV. 1355, 1356 (2002).

125. Koch, *supra* note 95, at 274.

126. *Id.*

127. *See* BALDWIN'S OHIO ADMINISTRATIVE LAW HANDBOOK AND AGENCY DIRECTORY (2004).

appointment authority—he or she has the ability to appoint board and commission members along with the power to appoint heads of departments. The governor thus has the power to implement policy through adjudications conducted by hearing examiners appointed by each of the individual agencies, but may exercise the appointment power only as vacancies are filled, typically through an attrition process that requires a full four years for complete turnover of appointed positions.

If taken as typical of non-central panel states, Ohio suggests there are significant limits to how effective a newly-elected governor can be in using the administrative adjudicative process to implement policy in a state with decentralized executive adjudicators. For example, when determining whether the adjudicators should receive training or other professional development to respond to emergent threats to public safety, the governor would need to seek assistance from any number of boards, commissions, agencies and departments. Rather than having one key person to go to—the Chief Administrative Law Judge of a central panel—the governor must rely on the effectiveness of any number of different approaches taken by state agencies when hiring and using administrative hearing examiners. Perhaps more than any other lesson learned from the attacks of 9/11, we know that it is critically important to make sure public safety officers and law enforcement officers can bridge gaps created by decentralization of governmental functions. Among all models of executive adjudication, the central panel approach most closely meets those needs because it divests individual agencies of many of the incidents of autonomy, while retaining the power to develop adjudicative systems with the one person actually elected as the state's executive officer—the governor—who in turn appoints the Chief ALJ.[128]

In 1997, the American Bar Association, through its House of Delegates, unanimously adopted the Model Act Creating a State Central Hearing Agency.[129] This template for creating a central panel of administrative law judges or hearing examiners is modeled on the legislation by which Maryland's Office of Administrative Hearings was created.[130] Key attributes of the model central panel are its ability to establish uniform mandatory minimum credentials for the adjudicators; its mandate that a code of ethics be established for all executive adjudicators; its ability to evaluate, train and discipline its adjudicators, and the fact that the Chief ALJ, not the agency, decides which ALJ will hear any particular case.

Neither the Model Act, nor Maryland's Office of Administrative Hearings, nor any existing variant of central panel should be regarded as the one true course to follow when creating a central panel designed to meet emergent public health and safety needs. Indeed, one of the key concerns is occasioned by the want of reliable and current data showing how states use agency adjudication, and how

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128. *See, e.g.*, MD. CODE ANN., STATE GOV'T § 9-1603(a) (2003) ("The Office is headed by a Chief Administrative Law Judge appointed by the Governor with the advice and consent of the Senate.").

129. *See* MODEL ACT CREATING A STATE CENTRAL HEARING AGENCY (1997), *reprinted in* McNeil, *supra* note 122, at 541 app.

130. McNeil, *supra* note 122, at 494.

such adjudication is perceived by the public as being fair and effective. There are, however, some characteristics of these panels that warrant particular attention by lawmakers interested in crafting a fact-finding system that will effectively respond to evolving demands for administrative decisionmaking. These characteristics may, in turn, suggest how to examine ALJ utilization in the states to see whether these or other variables might prove especially important in increasing the public's trust and confidence in administrative adjudication while at the same time ensuring the effective implementation of legislative initiatives through executive adjudication.

D. Critical Factors in Creating Responsive Adjudicative Structures After 9/11

Apart from the fundamental question of organizational structure, lawmakers should be aware of variables present in adjudicative systems that become prominent when ceding judicial power to the executive branch. Whether the presiding officer is an in-house staff member, a contract adjudicator, or a member of one form or another of central panel, the adjudication process needs to leave in all participants a sense that they have been heard by a fair and unbiased adjudicator. This may be particularly true when the adjudicative scheme involves public safety issues (as contrasted with, for example, utility rate-making or employment benefit programs).

1. The Unique Character of Public Safety Adjudications.—A review of the literature suggests a present need to consider the implications of direct threats to public health and safety at the state level. First, in a draft prepared by the Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities, the Model State Emergency Health Powers Act (MSEHPA) is offered in recognition of the need for contingencies against a spectrum of emergency health threats, "including those caused by bioterrorism and epidemics," that require "the exercise of essential government functions."[131] The MSEHPA is noteworthy in part because it brings to the fore the range of governmental action—at both the national and local levels of government—that are likely to be implicated in the event of future threats to our homeland security. Under the Act, government officials are authorized to gather data that otherwise might be kept confidential, and they are directed to coordinate efforts among the entire spectrum of governmental entities. They can "use and appropriate property as necessary for the care, treatment, and housing of patients, and to destroy contaminated facilities or materials"; are empowered "to provide care, testing, and treatment, and vaccination to persons who are ill or who have been exposed to a contagious disease"; and are given the authority to "separate affected individuals from the population at large to interrupt disease transmission."[132]

In balancing these powers against the protection of individual liberty and property interests, the MSEHPA recognizes the need to "respect the dignity and rights of persons," requires the use of these emergency powers be "grounded in a thorough scientific understanding of public health threats and disease

131. MSEHPA, *supra* note 45, at 328, pmbl.

132. *Id.*

transmission," and at the same time instructs "in the event of the exercise of emergency powers, the civil rights, liberties, and needs of infected or exposed persons will be protected to the fullest extent possible consistent with the primary goal of controlling serious health threats."[133]

Two provisions under the MSEHPA warrant mention with respect to adjudication. First, the Act invests in the judicial branch, not the executive branch, judicial authority to grant petitions for an order authorizing a quarantine of individuals or groups of individuals.[134] Second, the Act allows public health officials to retain sufficient power to direct isolation or quarantine without judicial approval "if delay in imposing the isolation or quarantine would significantly jeopardize the public health authority's ability to prevent or limit the transmission of a contagious or possibly contagious disease to others."[135] The Act imposes a check on the executive by limiting no-notice quarantines to ten days, during which time the public health authority is required to petition a court for authority to continue the isolation or quarantine.[136] Other than this judicial avenue, there is no provision for action by the public health authority to submit to fact-finding or an adjudication of any kind when deciding whether grounds exist for isolation or quarantine.[137]

One author, examining Missouri's legislative version of the MSEHPA, noted that, at least in Missouri, "[t]here are so many important procedural safeguards that need to be fully addressed in the states' laws that the Model Act gives no guidance."[138] The author notes that there are no provisions for protecting the constitutional rights of persons opposed to vaccination on religious grounds, no protection of persons whose immune systems or other conditions render them at greater risk in the event of a forced vaccination, no provisions for the enforcement of quarantine,[139] and no provision for health care responders whose job it would be to care for those in the quarantined area.[140] Indeed, if nothing else, it would seem beneficial at the earliest possible stage for legislators and the executive branch to determine which, if any, of these events warrant the intervention of informed fact-finders as adjuncts to regulatory schemes designed to protect public health in times of epidemic, whether induced by terroristic action or otherwise.

Closely akin to threats of bioterrorism are threats to the environment, whether or not induced by forces hostile to the United States. As one author noted:

The environment and public health goals hold a common value of

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133. *Id.*

134. *Id.* at 341-42, § 605(b) (isolation or quarantine with notice).

135. *Id.* at 341, § 605(a) (temporary isolation and quarantine without notice).

136. *Id.* at 341, § 605(a)(4).

137. *See id.* at 341-42, § 605(a)-(b).

138. Shenna Bradshaw, Note, *Quarantined: Is Missouri Prepared to Sacrifice Some of Its Constitutional Freedoms to Ensure Public Health Safety in an Outbreak?*, 71 U. MO. K.C. L. REV. 939, 952 (2003).

139. *Id.* ("Would there really be armed guards at the home of those quarantined . . . ?").

140. *Id.* at 951-52.

> healthy populations. The threat of bioterrorism requires a partnership of both, building upon the long history of the link between public health and the environment. This existing relationship is key to an effective system of biodefense for the nation, because the use of biological weapons through every environmental pathway poses a potential threat. Contaminations of water, growing crops, grazing cattle, air through inhalation, dermal absorption, or consumption of food or water in the human environment are potential delivery methods.[141]

Like public health, environmental systems have long been the subject of extensive regulation at all levels of government. In describing the shifts in policy wrought by the attacks of 9/11, the Environmental Protection Agency (EPA) announced that its "traditional mission has expanded to include protecting our country against the environmental and health consequences of acts of terrorism."[142] Through the Department of Homeland Security, the federal government signaled a change in how states should prepare against threats to security; it proposed "three shifts in federalism":[143]

> First, "the Department would set national policy and establish guidelines for state and local governments;" second, the proposal makes the Department of Homeland Security "the lead agency preparing for and responding to . . . biological . . . terrorism," which takes part of the states' public health agencies' responsibility as described in the CDC biodefense plan; and third, the proposal directs that "[t]he new Department would ensure that local law enforcement entities—and the public—receive clear and concise information from their national government," which again, takes part of the states' public health agencies' responsibility in originating their own public health information.[144]

Given these shifts in power, particularly in environmental and health-related fields, it makes sense to anticipate a need for administrative adjudications within the scope of the Homeland Security Act. It is also likely that some of those claims will be resolved through processes that usurp state procedural protections in favor of regional or national processes. It also suggests a need for executive adjudication schemes that work between and among neighboring states, as might arise where a river common to several states is threatened by terroristic contamination.

Remaining uncharted, even through the model offered in MSEHPA, are strategies for anticipating the need for cooperation among states, particularly

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141. Victoria Sutton, *Environment and Public Health in Time of Plague*, 30 AM. J.L. & MED. 217, 217 (2004).

142. *Id.* at 226 (quoting EPA Administrator Christine Todd Whitman's Sept. 2002 letter appended to EPA, STRATEGIC PLAN FOR HOMELAND SECURITY (2002), *available at* http://www.epa.gov/epahome/downloads/epa_homeland_security_strategic_plan.pdf).

143. *Id.* at 223.

144. *Id.* (citing OFFICE OF HOMELAND SECURITY, NATIONAL STRATEGY FOR HOMELAND SECURITY 2.5 (2002), *available at* http://www.whitehouse.gov/homeland/book/index.html).

neighboring states when subjected to threats that cross geographic borders. State line demarcations are meaningless when a region is responding to a biological threat, whether from terroristic action or careless handling of scientific material. While such threats may not give rise to a federal response, prescient state lawmakers should consider confederated responses, responses based on the needs of two or more states to act in collaboration with each other.

Equally important is the need to understand how best to bridge administrative procedural gaps arising not only among the states, but between the states and the federal government. Legislation drafted in furtherance of protecting homeland security will, by its very nature, include interests that are both local and national in character. When, for example, British health authorities in the fall of 2004 shut down one of two main flu vaccine suppliers to the United States, the public health implications were felt at all levels of government. Professor Richards noted the trend[145] as state and federal public health officials reacted with a number of administrative schemes designed to route scarce vaccines to those most in need.[146] In the absence of any administrative procedure bridging the gap between state and federal interests, the patchwork of approaches is both stark and unsettling.

One step in this direction is the development of model rules of administrative procedure for use in proceedings conducted under interstate compacts. The Administrative Law and Regulatory Practice Section of the American Bar Association convened a task force in early 2004, charged with drafting a model APA for use by entities created through interstate compacts.[147] The task force will develop protocols for subscriber states to use when joining interstate compacts similar to the compacts already available to states in regulating driver licensing among member states.

Despite the urgency that would accompany any terroristic attack, there should be some regard given to public reaction to and understanding of substantial

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145. *See* Professor Edward P. Richards, Louisiana State University Law Center, Medical and Public Health Law Site, *Emergency Measures to Manage the Flu Vaccine Shortage*, *at* http://biotech.law.lsu.edu/cases/vaccines/oregon_flu. htm (last visited Feb. 6, 2005).

146. *See* OREGON DEP'T OF HUMAN SERVS., OREGON INFLUENZA VACCINE EDUCATION AND PRIORITIZATION PLAN 2004-05 (Oct. 8, 2004), *available at* http://biotech.law.lsu.edu/cases/vaccines/finalfluplan.pdf.

> The Oregon State Health Officer has determined that, due to an influenza vaccine shortage, adverse and avoidable health consequences to identifiable categories of high-risk individuals could occur. Therefore, assistance with administration of vaccine is warranted to protect these individuals. Under Oregon Revised Statute 433.040, the State Health Officer and the Oregon Department of Human Services (DHS) implement this Oregon Vaccine Education and Prioritization Plan to protect the public during a vaccine shortage. The plan consists of: 1) guidelines for healthcare providers; 2) rules for imposing civil penalties for violation of the guidelines; 3) mobilizing public and private health resources; and 4) notifying health professional boards of violations. This Plan is effective immediately, October 8, 2004, and will stay in effect through March 31, 2005, unless otherwise amended or rescinded.

Id.

147. *See* Ronald M. Levin, *Interstate Compacts and Administrative Procedure*, 29 ADMIN. & REG. L. NEWS, Winter 2004, at 7-9.

deprivations of property or liberty interests. In his article, *When Terrorism Threatens Health: How Far are Limitations on Personal and Economic Liberties Justified*, Professor Gostin notes the value of perception and norms, even during a crisis such as would be launched upon us in the event of another attack:

> Primarily, due process helps ensure that compulsory powers are correctly applied. By affording individuals the right to a fair hearing, there is increased certainty that the individual actually is infectious, poses a risk to others, and cannot or will not comply with public health advice. Even if due process cannot always ensure the accuracy of decisionmaking, there is a normative value in granting a right to a hearing. Government demonstrates respect for individuals by allowing them to see the evidence against them and present their case to an impartial fact finder. There is a self-expressive importance to procedural due process; fair procedures allow individuals to convey a sense of grievance that has intrinsic worth. There also is a value to racial, ethnic, or religious groups that feel singled out unfairly for coercion. By allowing members of the group to articulate the perceived unfairness in an open and deliberative process, the group gains a collective sense of being heard.[148]

If we heed Professor Gostin's teaching, then it would behoove the government to anticipate the public's attention and its need to be able to trust the adjudicative systems in place, even during times of local or national strife in response to a terroristic threat or act.

2. The Need for Current ALJ Utilization Data.—Before applying Professor Gostin's suggestions and before making recommendations based on this review of the law, some mention should be made about the real limits of this analysis. A premise central to this Article is that the administrative process succeeds only to the extent that people have trust and confidence in it. A large motivating force behind the central panel concept is that separating the adjudicator from the agency decreases the risk of improper governmental influence over fact-finders and does so in a way that the public will both recognize and appreciate. Lacking in this premise, however, is substantial quantitative data; we know neither how ALJs are utilized in the states nor how the public receives them. If one of the other premises of this Article proves true and we find the use of executive branch adjudications increasing as we shift decision-making power from the judicial branch to the executive branch in response to threats to public health and safety, then it would seem to be of critical importance that we gather the data needed to fully inform lawmakers of how best to promote administrative adjudications at the state level.

3. The Life of the Law is Experience.—The epigraph to this Article reminds us of Holmes's often-quoted observation that the "life of the law has not been logic: it has been experience."[149] Indeed, it seems few areas of the law are more dependent on experience, and not logic, than are due process analyses in the

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148. Lawrence O. Gostin, *When Terrorism Threatens Health: How Far are Limitations on Personal and Economic Liberties Justified?*, 55 FLA. L. REV. 1105, 1165-66 (2003).

149. HOLMES, *supra* note 1, at 5.

context of administrative law. From its inception, administrative law has defied simple and logical structures, electing instead to nearly self-generate by picking and choosing pieces of legal systems from the judicial and legislative branches, all in an attempt to facilitate the efficient and fair use of executive branch resources. Determining just how much "process" is due under a given set of laws and facts is more art than science, and doing it well under adverse conditions can be both trying and highly rewarding, often at the same time.

An adjudicative system, whether in the executive branch or the judicial branch, must reflect Holmes's view that experience should guide us. Stated as a question, what experiences can we draw upon when asking lawmakers to give judicial or judge-like powers to the executive branch? How can we wean the public, one that has a deep and abiding trust in notions of justice and due process, away from the judicial model of adjudication so that it will have trust and confidence in fact-finding proceedings conducted not by the judicial branch but instead by the executive branch? It is no answer to pretend the ALJ is a judicial branch adjudicator. Indulging in such pretense may appease ALJs who aspire to be judicial branch judges, but it misleads the public and does not advance the cause of due process. Perhaps a better approach would be to develop the executive branch so that its adjudicators inspire in all participants the sense of justice having been served whenever an ALJ takes the bench.

4. Why ALJ Utilization Data is Important: Due Process in Agency Adjudications.—Missing from this equation to date, however, is data that will show how agencies currently use executive adjudicators and how the public receives these adjudicators. ALJ utilization and the public's perception of the administrative adjudication process are key parts of any comprehensive due process analysis of agency adjudications. Under the three-part test of due process articulated in *Mathews v. Eldrige*,[150] courts will weigh governmental adjudication claims against a standard that asks (1) what are "the private interest[s] that will be affected by the official action," (2) what is "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and (3) what is "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[151]

Applying this balancing formula, we see that agency process will be evaluated not by a single easily articulated set of standards, but relatively. How does the process being evaluated on appeal look when compared with other adjudicative processes? What are the risks that the agency might reach an erroneous conclusion based on the process being reviewed? What "additional or substitute procedural safeguards" exist? What are the costs and benefits inuring to the Government, i.e., the "fiscal and administrative burdens," that additional or substitute processes would entail? Due process thus anticipates comparisons, both by agencies when creating adjudicative schemes and by courts when reviewing the adequacy of such schemes. We therefore want to encourage

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150. 424 U.S. 319, 335 (1976).

151. *Id.*

agencies to compare processes and to consider the fiscal and administrative burdens associated with conducting adjudications so as to better defend the ways and means of a given state's administrative hearing process.

What is missing from this calculus is data: data showing how states use ALJs, and how agencies, the participants, and the public regard ALJ utilization. As noted above, the Administrative Conference of the United States (ACUS) conducted a national survey in 1992 to gather data about federal ALJ and AJ utilization. For that study, questions were presented to 1150 sitting federal ALJs, with 610 (about 53%) responding; 380 questionnaires were sent to AJs, with 264 (about 69%) responding.[152] Because the study concerned the presiding officials' "perception of the potential challenge to their independence, and realistic responses,"[153] it was limited to considering the adjudicator's viewpoint only; the study probed neither the agency nor the litigants, leaving out key elements of a comprehensive analysis of how agencies operate, how they use adjudicators, how the agencies respond to their adjudicators, and how litigants and the public at large regard the process. Nevertheless, the ACUS group of surveys described by Professor Koch provides an important building block upon which a more comprehensive examination of ALJ utilization may be made.

5. Using ALJ Utilization Data to Build Social Frameworks for Courts and Legislature.—Data concerning ALJ utilization could be of substantial assistance to states as they develop adjudicative tools designed to meet emergent health and safety adjudication needs, particularly in the aftermath of 9/11. We know little of what kinds of threats will present themselves, but we know there are many ways of responding to those threats (and anticipating them so as to prevent the harm posed by the threats). Data on ALJ utilization could provide what is needed to build what social scientists Laurens Walker and John Monahan call the "social frameworks" that are useful when lawmakers and other decision-makers create legislative systems.[154] This data, if gathered and examined appropriately, could be interpreted through empirical analysis and then used by courts in the due process calculus required by *Mathews v. Eldridge*. Ideally, we would gather data from every state to know better how states use ALJs, in what kind of cases, with what kinds of process, and we would know how effective those processes are in earning the public's trust and confidence.

Walker and Monahan offer some guidance when setting about to construct social frameworks, particularly where the goal is to introduce the results of the analysis in court proceedings. "Frameworks," they explain, "resemble legislative facts as much as they resemble adjudicative facts."[155] Here, the reference to adjudicative and legislative facts comes from Professor Davis, who distinguished

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152. Koch, *supra* note 95, at 276-77.

153. *Id.* at 277.

154. Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 568 (1987) (using the term "social framework" to "refer to [the] uses of general conclusions from social science research in determining factual issues in a specific case," *id.* at 560, and providing as examples "cases concerning eyewitness identification, assessments of dangerousness, battered women, and sexual victimization," *id.* at 563).

155. *Id.* at 584.

the two: "When an agency [or court] wrestles with a question of law or policy, it is acting legislatively, . . . and the facts which inform its legislative judgment may conveniently be denominated legislative facts."[156] In the context of administrative proceedings, whether a material fact is "adjudicative" or "legislative" may make a difference in who—as between the agency head or the ALJ—makes the factual determination.[157] Walker and Monahan apply this in the context of creating tools for use by courts:

> Legislative facts, in other words, are facts that courts use when they make law (or "legislate"), rather than simply apply settled doctrine to resolve a dispute between particular parties to a case. While the determination of adjudicative facts affects only the litigants before the court, the determination of legislative facts influences the content of legal doctrine itself, and therefore affects many parties in addition to those who brought the case.[158]

Data about ALJ utilization would be useful in creating legislative facts. For example, if we knew that most state ALJs prepare recommendations only and do not render final orders, and if the data shows strong public support for this approach, then we could use this information in the cost/benefit analysis required under *Mathews*. Against a challenge that the agency's decision should be rendered by the ALJ and not subject to review by the agency, the agency could present as a legislative fact the high correlation of participant satisfaction with ALJ recommendation authority. The *Mathews* due process test is a hybrid of fact (e.g., what are the different procedural options available throughout the states and when are they used) and policy and law (e.g., what is the likely value of additional protections). Given this hybrid nature, building a social framework using ALJ utilization data to create legislative facts would, potentially at least, allow state courts nationwide to consider national data concerning ALJ utilization. This would be useful when the court has to evaluate a claim under *Mathews* that a given adjudication scheme (perhaps one that did not provide for face-to-face hearings, for example) meets or fails to meet each of the three tests in *Mathews*.

One goal of this Article, then, is to suggest the need for collecting data from all the states that would permit the development of a social framework describing ALJ utilization in the state administrative adjudication process. Such data would include information about which states use ALJs, for what purpose, with what

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156. Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942); *see* Getty Petroleum Mktg., Inc. v. Capital Terminal Co., 391 F.3d 312, 322 n.12 (1st Cir. 2004) ("'Adjudicative' facts, which are governed by Fed. R. Evid. 201, are 'simply the facts of the particular case.' . . . 'Legislative facts,' by contrast, include facts 'which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.'") (internal citation omitted).

157. *See* F. Scott McCown & Monica Leo, *When Can an Agency Change the Findings or Conclusions of an ALJ?: Part Two*, 51 BAYLOR L. REV. 63, 68-69 (1999).

158. MONAHAN & WALKER, *supra* note 1, at 181.

qualifications, with what level of judicial review, and at what cost. It would also include data about user trust and confidence in the adjudicative process as well as data about agency confidence in its own ability to implement policy through the adjudicative process. Such an analysis is currently being considered by the National Association of Administrative Law Judges, in conjunction with the National Judicial College and the LBJ School of Public Affairs. If implemented, such a study may yield data from the first national ALJ utilization survey expressly designed to develop a greater understanding of state administrative adjudication systems.

V. IDENTIFYING RELEVANT REQUIREMENTS IN AGENCY ADJUDICATION LEGISLATION

In order to prepare lawmakers for the challenges that exist when creating or updating an executive adjudication system, it seems prudent to learn what we can from existing ALJ adjudication programs. In any review of legislation considering the use of ALJs in agency fact-finding, four key requirements merit mention. First, the system must, through continuing education ensure a trained and competent pool of adjudicators. Second, there must be some express provision regarding ex parte communication between the adjudicator and the agencies being served. Third, lawmakers must determine whether the ALJ's decision will be binding on the agency. Fourth, the role of the judicial branch and its oversight of agency decision-making must be expressly stated. Meeting these requirements can reassure participants that all protected property and liberty interests will be protected and respected, while at the same time ensuring that even during times of high anxiety due to threats to public safety, executive policy and process requirements will be adhered to.

A. Educating the ALJ on Policy and Process

Whether the ALJ is internal to the agency or a member of a central panel, he or she is valued both because of his or her familiarity with substantive agency programs and because of his or her ability to apply due process principles to the agency's adjudication process. Maintaining that level of familiarity with substance and process is critically important, particularly in emergency management. It is even more critical now that innovative threats to our homeland security may surface with little or no advanced warning. Any legislation that might adversely affect liberty or property rights would need, as a bare minimum, a means of ensuring that the appointed adjudicators are familiar with the public health and safety policies supporting such legislation and understand the nature of due process protections under both state and federal law.

Here, the central panel has clear advantages that should be taken into account by lawmakers when deciding the kind of adjudicator that should be used to hear public safety cases. First, central panels are more efficient and effective at distributing information. Peer-to-peer educational programs, like those provided through the National Judicial College at the University of Nevada—Reno, allow topical and timely dissemination of fundamentals of law and current trends both within the state and across the nation. Within a state's central panel, information

can be passed along among ALJ peer networks. ALJ competence and proficiency is assured through pooled resources like joint continuing professional development seminars, peer review and quality control, in-house training, intranet e-mail, and other peer-to-peer programs.

In contrast, the internal ALJ system described by Professor Rossi[159] must decide, on an agency-by-agency basis, whether to invest in any given educational program. Viewed from the perspective of a governor's chief of staff, this decentralized system of keeping ALJs current on the law is significantly less cost-efficient and may fall materially short if training is required on an ad hoc and emergency basis. Worse yet is the itinerant contractor system, which depends entirely on the individual ALJ's willingness to invest in the cost of relevant continuing education. Neither the internal adjudicator nor the contract adjudicator benefit from the transfer of information between state-wide ALJs who pool information about their collective experience and disseminate that information through an efficient and inexpensive state-wide training system.

The unique nature of public safety hearings—including the need to adapt quickly to emergent and diverse threats—suggests a need to prepare executive adjudicators for highly contingent or uncertain demands. A governor should have confidence that his or her cadre of executive adjudicators can quickly identify administrative needs in response to public health or safety threats and apply known procedural protections when adjudicating issues arising from these needs. One developing trend in furtherance of this concept is the idea of a national certification for administrative law judges.[160] Ideally the certification would attest to the adjudicator's knowledge of state and federal due process rights and reflect the adjudicator's ability to apply those doctrines to any new conditions confronting an executive agency. It would also set minimum qualifications for persons who ask to be ALJs or hearing examiners and minimum continuing education requirements. Even those states whose agencies prefer to use internal or itinerant adjudicators would benefit from having a widely recognized educational credential to rely on when hiring or retaining adjudicators.

B. Ex Parte Communication: Before, During and After a Hearing

When lawmakers consider whether to delegate fact-finding to an executive agency, some thought should be given to the manner in which adjudicators learn about agency policy. A fundamental expectation is that any law, regulation, policy, or directive used by an agency adjudicator must be plainly identified during the hearing process so that all parties know what law is being applied, and so that challenges to such law may be made in a timely and effective manner. It is antithetical to notions of fundamental fairness for the parties to make a presentation to an ALJ based on one set of laws (the publicly known set), only to

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159. *See supra* text accompanying note 118.

160. *See* NAT'L ASS'N OF ADMIN. LAW JUDGES, STRATEGIC AND LONG-RANGE PLAN, at X(B)(1)(e) (Oct. 11, 2003), *available at* http://www.naalj.org/strategicplan.pdf; National Association of Hearing Officials, *NAHO Certification Program—2005*, *at* http://www.naho.org/Certific1.htm (last updated Feb. 25, 2005).

have the ALJ adjourn after hearing the evidence and then base his or her decision on another set of laws, perhaps expressed only through word of mouth or institutional tradition.

Drawing upon the federal APA for guidance, lawmakers could elect to prohibit ex parte communication, at least with respect to formal adjudication proceedings. Ex parte communication "relevant to the merits of the proceeding" are prohibited under the federal APA.[161] Professors Pierce, Shapiro and Verkuil explain that the limit on ex parte communication in federal APA formal adjudications "obviates any necessity of judging the consequences on an administrator and offers significant protection to litigants from possible unfairness."[162] They go on to explain, however, that section 557(d)(1) of the APA applies only to those in the agency performing investigative or prosecutorial functions; and as a result, "agency heads, or commissioners, by the literal terms of the APA, are free to make contact with ALJs about matters before them."[163]

Lawmakers would be well-advised, then, to determine consciously whether ALJs should be limited to considering only the expressions of law exchanged during the evidentiary hearing, and whether they should be subject to ex parte communication on matters then pending before them. In both respects, the result should be a transparent decision-making process, one that permits the parties and the public to know the factual and legal bases for all agency adjudications.

C. To Bind or Not to Bind: The Controlling Effect of an ALJ's Decision on the Agency

Another consideration when delegating adjudicative authority to the executive branch is whether the person who hears the evidence will make the final decision, or whether that person will instead offer a summary of the record for the benefit of the agency head who has retained final decision-making authority. The power of an ALJ to bind the agency is something of a recent development, which has caught the attention of several commentators.

Professor Rossi writes about this development in his article, *Final, But Often Fallible: Recognizing Problems with ALJ Finality*.[164] He discusses both de jure finality, where by legislation ALJs are invested with statutory authority to render final decisions, and de facto finality, where the burden involved in successfully challenging ALJ findings is so substantial as to render the ALJ's decision final through the use of "presumptions that, in effect, make the ALJ's recommendations final."[165]

The degree of difficulty an agency has in modifying or rejecting an ALJ's findings of fact or conclusions of law is a significant factor in how effectively agency policy may be expressed through adjudication. As Professor Flanagan aptly notes, in those central panels where the ALJ has the power to render a final

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161. 5 U.S.C. § 557(d)(1)(A) (2000).

162. PIERCE ET AL., *supra* note 78, at 71.

163. *Id.* at 495.

164. Rossi, *supra* note 118, at 53; *see also* Flanagan, *supra* note 124, at 1373-76.

165. Rossi, *supra* note 118, at 63.

order, the ALJs

> will produce different interpretations and different results of the same issue and will affect both the institution and the litigants. As for the agency, the uncertainty affects all of its actions, before and after they become contested cases. Any inconsistency between the policy articulated by the agency and the policy enforced in contested cases leads to confusion in the law.[166]

This confusion could be significant in adjudicating public safety cases, where both fact and law may be controverted. In public safety cases posing novel questions or questions not yet fully vetted by agency interpretation, it would be up to the ALJ to articulate publicly an agency interpretation of law based on the facts presented in the record. Professor Rossi notes the problem:

> From an accountability perspective, allowing a central panel ALJ to trump the agency on [policy issues] is problematic. Central panel ALJs often operate within the executive branch, but they are generally non-political. Unlike the agency, which has substantive regulatory jurisdiction, the central panel has not been delegated the authority to regulate in a specialized area. Agency heads, unlike most ALJs, are political appointees, accountable (through appointments and removal, as well as budgetary oversight) to the executive branch and—perhaps to a lesser, but no less important degree—the legislature (which writes and amends regulatory statutes). The political accountability of agency heads is important to ensuring the public legitimacy of agency action.[167]

Lawmakers can avoid this potential for confusion, by expressly investing in the agency final decision-making authority, even in those systems that employ a central panel.[168]

D. Judicial Deference to Executive Adjudications in Public Safety Cases

Judicial oversight may be appropriate when an agency completes its fact-finding and makes its final determination of the rights and interests of the participants in an administrative action. Although not constitutionally mandated,[169] judicial review of agency action serves as an important check against governmental abuse and has been widely employed both at the federal and state levels. Given existing jurisprudence permitting adjudication by decisionmakers who are not wholly independent of the interests of parties, only by effective judicial review of agency orders can the legislative branch assure the public of an independent evaluation of both law and fact issues. Yet, when it

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166. Flanagan, *supra* note 124, at 1402.

167. Rossi, *supra* note 118, at 71.

168. *See* Rossi, *supra* note 118, at 73 ("In reviewing issues of policy, the agency's reasoning framework should trump the ALJ's reasoning, or that of any competing expert witness.").

169. FUNK ET AL., *supra* note 37, at 27 ("[A]lthough most agency actions can be appealed, the [federal] APA recognizes that not all decisions are subject to judicial review.").

reviews agency action, a court should take into account the procedural path that led to appellate review.

The degree of deference to which an agency's decision is entitled when being reviewed by a court has long been a relevant and sometimes changing factor in administrative law. Professor Rossi alerts us to one such change, occasioned by a trend towards investing final decision-making authority in the ALJ, rather than the agency.[170] While deference to the ALJ in fact-finding seems intuitive (because the ALJ is the only adjudicator who actually observes the witnesses and makes admissibility decisions on questions as they arise during a hearing), such deference to the ALJ seems misplaced with respect to questions of policy and law. Rossi makes the point:

> One of the primary reasons for giving weight to the agency interpretation or deferring to the agency is enhanced accountability, to the extent the agency is responsible for enforcing the statutory scheme. Yet, deference to an ALJ final order on issues of statutory interpretation risks undermining agency accountability, particularly where the ALJ and agency do not agree on the merits of a policy choice or statutory meaning. Here, independence and accountability are in sharp tension.[171]

The tension Rossi cites is certain to be present when agencies adjudicate public health and safety claims, particularly as new policies are introduced in response to the attacks of 9/11. The wide array of homeland security issues confronting the nation's executive officers holds the potential for innumerable questions involving the balancing of private liberty and property interests against the common good. Thus, lawmakers would be well advised to consider carefully the degree of deference that should be given when courts review agency decisions. Rossi suggests that courts consider public accountability when deciding how much weight to give to an agency decision, and offers this workable approach:

> At a minimum, reviewing courts should give strong weight to the agency's interpretation of law, regardless of how the ALJ decided the legal issue. From an accountability perspective, the deference approach has much to commend, so long as reviewing courts defer to the agency—not the ALJ—on issues of law in final ALJ orders.[172]

In making administrative decisions, the agency's interpretation of law and policy should be expressed as clearly as possible, with as few unintentional inconsistencies as possible. Deferring to the agency on questions of policy and law, as Rossi suggests, would promote a broader understanding of the law and render the decision-making process less prone to the arbitrary action of individual executive adjudicators.

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170. Rossi, *supra* note 118, at 70-73.

171. *Id.* at 74.

172. *Id.*

VI. RECOMMENDATIONS AND CONCLUSION

Executive branch adjudicators are well possessed of the resources and the skills to serve the nation and its states in times of emergent threats to public safety. Due process tradition has long been entrusted to the "fourth branch" adjudicator, for reasons that include the ability to assemble rapidly, adapt to exigent conditions, and render prompt decisions fairly, doing so all in a manner that is open for all to see. There is every reason to believe that with forethought and diligence, lawmakers will be able to repose in the executive branch substantial fact-finding and decision-making power as the need arises, particularly with respect to legislation designed to protect the public from threats to health and safety.

An essential resource now lacking is a meaningful and comprehensive database reflecting ALJ utilization at the state level. Our lawmakers, working both as separate state sovereigns and working collectively, would benefit from a better understanding of how individual states use ALJs. Equally important, we would all benefit from knowing how administrative adjudication processes are regarded by the public. These adjudications are, in large part, successful only if the public has trust and confidence in the fairness of the proceedings. As politically accountable players in this process, agencies, too, have a stake in this, and they expect the process to be not only fair but effective.

When lawmakers create legislative schemes designed to respond to new threats to public safety, their actions must be guided by the collective experiences of existing administrative adjudication systems. Guided by these experiences and armed with current and accurate ALJ utilization data, lawmakers would then be in a position to create fair and effective health and safety laws—laws that take into account the organizational structure of the executive adjudication system, the strengths and weaknesses of its adjudicators, the hierarchy of authority, and the role of the judiciary in serving as an effective check on the executive branch in administrative adjudications.

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NOTES

VOLUNTARY ACKNOWLEDGMENTS OF PATERNITY: SHOULD BIOLOGY PLAY A ROLE IN DETERMINING WHO CAN BE A LEGAL FATHER?

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INTRODUCTION

Today's modern family encompasses relationships that the law never anticipated. Courts face the realities of single parents, unmarried parents, same-sex marriages, and reproductive technology. In the early 1970s, the norm was a traditional family, consisting of a married couple and their offspring, living together in the same household.[1] The father financially supported his family, sharing with his wife the care, custody, and control of their children. By the early 1970s, however, the number of unmarried mothers began to increase dramatically, doubling in percentage from 1960.[2] Between 1970 and 1992 the number of births to unmarried women in the United States increased from eleven percent to thirty percent of all births,[3] and between 1992 and 2002 the number increased to thirty-four percent.[4] By 1994, forty percent of women in their thirties had given birth to an illegitimate child.[5] Added to this already complicated social environment is the fact that the rate of paternal discrepancy, that is when married women bear children not biologically their husbands', is

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1. U.S. BUREAU OF THE CENSUS, FAMILIES, BY PRESENCE OF OWN CHILDREN UNDER 18: 1950 TO PRESENT (Sept. 15, 2004), *at* http://www.census.gov/population/socdemo/hh-fam/tabFM-1.xls.

2. Child Trends Data Bank, *Percentage of All Births That Were to Unmarried Women, by Race and Hispanic Origin, Selected Years, 1960-2003, at* http://www.childtrendsdatabank.org/figures/75-Figure-1.gif (last visited Mar. 25, 2005); KEN BRYSON, U.S. BUREAU OF THE CENSUS, CENSUS BRIEF: AMERICA'S CHILDREN AT RISK 1 (Sept. 1997), *at* http://www.census.gov/prod/3/97pubs/cb-9702.pdf.

3. Stephanie J. Ventura & Christine A. Bachrach, *Nonmarital Childbearing in the United States, 1940-99*, 48 NAT'L VITAL STATS. REPS. No. 16, at 17 (2000) (percentages rounded up).

4. Brady E. Hamilton et al., *Births: Preliminary Data for 2002*, 51 NAT'L VITAL STATS. REPS. No. 11, at 1, 3 (2003) (percentages rounded up).

5. AMARA BACHU, U.S. BUREAU OF THE CENSUS, FERTILITY OF AMERICAN WOMEN: JUNE 1994, CURRENT POPULATION REPORTS, P20-482, at v (1995).

approximately ten to fifteen percent between stable couples, either married or cohabiting.[6]

The erosion of the traditional family has affected all aspects of modern society and has rendered no area more ambiguous than fatherhood. Paternity disputes, ranging from custodial and child support issues to both the establishment and dissolution of paternity, are now customary in family courts.[7] The traditional tools for dealing with such issues have been replaced by statutes that acknowledge these modern realities.[8]

Federal policy favors establishing the paternity of an "illegitimate" child born to an unmarried woman or to a woman and a man other than her husband, so as to provide the child the same opportunities available to children born in wedlock—proper care, maintenance, education, protection, and support.[9] Historically, the mother had to file a paternity suit in order for her child to have a legally recognized relationship with his unwed father.[10] In the past ten years the federal government has enacted legislation intended to simplify the procedures by which a man can establish legal paternity.[11]

The current framework set forth in Title 42, Chapter 7, Title IV, Part D of the

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6. Ira Mark Ellman, *Thinking About Custody and Support in Ambiguous-Father Families*, 36 FAM. L.Q. 49, 56-57 n.21 (2002) (citing R. ROBIN BAKER & MARK A. BELLIS, HUMAN SPERM COMPETITION: COMULATION, MASTURBATION, AND INFIDELITY 199 (1995)).

7. Victoria Schwartz Williams & Robert G. Williams, *Identifying Daddy: The Role of the Courts in Establishing Paternity*, JUDGES' J., Summer 1989, at 2 ("The sharply increasing volume of nonmarital births and the severe social consequences engendered by failing to establish paternity pose a challenge to the public agencies, including the courts, to process these cases more quickly and effectively.").

8. The federal statute that specifically deals with the issue of paternity is 42 U.S.C. § 666 (2000). *See also* FLA. STAT. § 742.11 (West 1997) (discussing the presumed status of a child conceived by means of artificial or in vitro insemination or donated eggs or pre-embryos); N.H. REV. STAT. § 168-B:3(I)(e) (2003) (discussing the presumption of paternity in a case involving artificial insemination).

9. *See* Jeffrey A. Parness, *Old-Fashioned Pregnancy, Newly-Fashioned Paternity*, 53 SYRACUSE L. REV. 57, 59-60 (2003).

> Parentage determination does more than provide genealogical clues to a child's background; it establishes fundamental emotional, social, legal and economic ties between parent and child. It is a prerequisite to securing financial support for the child and to developing the heightened emotional support the child derives from enforceable custody and visitation rights. Parentage determination also unlocks the door to government provided dependent's benefits, inheritance, and an accurate medical history for the child.

Id. (quoting U.S. COMMISSION ON INTERSTATE CHILD SUPPORT, SUPPORTING OUR CHILDREN: A BLUEPRINT FOR REFORM 120 (1992)).

10. Paula Roberts, *Truth and Consequences: Part I. Disestablishing the Paternity of Non-Marital Children*, 37 FAM. L.Q. 35, 35 (2003).

11. 42 U.S.C. § 666(a) (2000).

Social Security Act ("Title IV-D")[12] provides for two distinct methods of establishing paternity. First, either the mother or father can file a paternity suit, in which a genetic test will be ordered only upon request.[13] In such cases, paternity will follow only if the test reveals biological paternity in the man. The court may then enter an order of paternity and for child support.[14] Second, the parents can voluntarily acknowledge paternity through an informal civil procedure.[15] Title IV-D consists of a series of federal mandates that states must abide by in order to receive federal funds, and calls for the establishment of a non-judicial means for a non-marital father to achieve legal paternity.[16] Under Title IV-D, a voluntary acknowledgment of paternity, even in the absence of a court order or genetic testing, is the equivalent to a *legal finding of paternity*.[17] Thus, in an effort to ensure support for a child born out of wedlock, the government has made it virtually effortless to become a legally recognized father. The proper execution of a paternity acknowledgment is a final judgment, entitled to "full faith and credit in other states."[18] Child support will not automatically follow, but must be requested by the parent in a separate hearing.[19]

This Note explores the complex background that has evolved into today's paternity laws and, in particular, the voluntary acknowledgment of paternity. In creating an acknowledgment that carries the legal equivalent of a judicial decree, it appears that the government intended to bar future challenges by a man who voluntarily signed an affidavit with the knowledge that he is not the child's biological father. Taking this one step further, a mother, after consenting to a paternity affidavit by a man she knows is not the biological father of her child, should not be allowed to contest his paternity at a later date.

The voluntary paternity affidavit has the potential to be a powerful tool—both in the lives of children and in family courts. Finality of paternity judgments supports the best interests of the child by not disrupting the father-child bond or rendering a child fatherless, despite the biological realities. In practice, however, many states differ on the issue of who can be a father. In

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12. *Id.* § 666(a)(5).

13. *Id.* § 666(a)(5)(B).

14. *Id.* § 666(a)(5)(D)(i)(II); *see also id.* § 666(a)(5)(M).

15. *Id.* § 666(a)(5)(C). This statute provides for "a simple civil process for voluntarily acknowledging paternity under which the State must provide that, before a mother and a putative father" can execute a paternity acknowledgment, there must be appropriate notice such that the parents are apprised of the legal consequences, rights, and responsibilities of taking such action. *Id.* § 666(a)(5)(C)(i).

16. *Id.* § 666(a)(5)(C).

17. *Id.* § 666(a)(5)(D)(ii).

18. *Id.* § 666(a)(5)(C)(iv).

19. Courts generally enter orders for child support; however, many states have established independent administrative processes for order establishment. Roberts, *supra* note 10, at 36 n.12. 42 U.S.C. § 667 requires that states provide for such guidelines. "The parties might also enter a voluntary agreement about support, but this agreement is not usually enforceable and must be reduced to a judgment to make it so." Roberts, *supra* note 10, at 36 n.12.

some states, once a man establishes that he is not the biological father he is swiftly released from all responsibility, despite having knowingly executed a voluntary acknowledgment of paternity.[20] These divergent policies create a dilemma as to whether there should be paternity affidavits and, if so, how should they be treated by the individual states. Circuits are split on whether a non-biological father can sign a voluntary acknowledgment of paternity and become the "legal" father, and if so, the manner in which they should be treated by the individual states.[21]

Part I of this Note outlines a brief history of illegitimacy, from the common law marital presumption of paternity and the stigma associated with illegitimacy, through the evolution of the Uniform Parentage Act of 1973 and its revolutionary approach to this issue. Part II focuses on current statutes, namely Title IV-D, which is federally mandated to the states in exchange for funding. The discussion centers on the voluntary acknowledgment of paternity, and the exact procedures contemplated by Title IV-D with respect to the establishment of paternity. Due to the legally binding nature of the voluntary acknowledgment of paternity, and the rights and responsibilities that follow, one might imagine that there would be a formal notice requirement, such that any man who established his paternity this way would be fully apprised of the legal significance. However, the requisite notice to acknowledging parents is minimal, and this particular section of Title IV-D is left primarily to state discretion.

In Part III, the discussion continues chronologically with the Uniform Parentage Act of 2000, amended in 2002, and concentrates on the changes from the 1973 version and the current relationship to Title IV-D provisions. Although the Uniform Parentage Act is a non-mandatory model act, it does provide guidance on many issues left unanswered by Title IV-D. Part IV addresses an enormous issue left untouched by Title IV-D, namely the role of the biological father in voluntary acknowledgments of paternity. Title IV-D makes no rule as to whether this informal paternity establishment process should be restricted to biological fathers only, while the Uniform Parentage Act of 2002, however, clearly narrows the process towards the natural, biological father.

Thus, the formative debate emerges in Part V, which focuses on the divergent paths taken by the states in complying with Title IV-D, particularly in cases of paternity disestablishment. When a man brings an action to disestablish his paternity after the sixty day rescission period has expired, Title IV-D says that he can only bring such a challenge on the grounds of fraud, duress or material misrepresentation.[22] This discussion focuses on how the states have interpreted this federal law. The inconsistencies from state to state are staggering. At the core of this discussion is whether a non-biological father can establish legal paternity and maintain the rights and responsibilities associated with a biological father's voluntary acknowledgment of paternity.

Part VI addresses the best interests of the child, where this consideration fits

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20. *See infra* Part IV.

21. *See infra* Part IV.

22. 42 U.S.C. § 666(a)(5)(D)(iii) (2000).

in the law and the judicial decision-making process. Finally, Part VII responds to the implications of state discretion under Title IV-D and discusses various propositions related to the paternity establishment process. Among these proposed ideas is the notion that there should not be a voluntary paternity acknowledgment process because it does not serve its intended purpose. In addition, this Note considers strict enforcement of all voluntary paternity affidavits such that no one would be able to successfully challenge legal paternity in the future, taking into account what additional requirements must be implemented to support absolute finality of judgment. Mandatory genetic testing would only create additional systemic problems and is rejected as a potential solution. The optimum proposed solution consists of creating an additional bureaucratic layer geared to resolve many of these cases prior to adjudication.

I. HISTORICAL BACKGROUND

A. The History of Illegitimacy

Traditional law governing parenthood was framed long before the advent of modern sociological and scientific changes. A child born to unwed parents was considered illegitimate in the eyes of the law, and was subsequently treated as inferior to a child born in wedlock. An illegitimate child had no right to child support and was stigmatized by his status in a society of traditional ideals.[23]

In the days before genetic testing, a child rarely knew for certain the identity of his biological father. Consequently, the law formulated a series of presumptions designed to protect children from the stigma of being labeled illegitimate.[24] The traditional marital presumption of paternity settled any questions of paternity on the assumption that the mother's husband was the biological father.[25] At common law this presumption could only be rebutted by

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23. *See* Michael H. v. Gerald D., 491 U.S. 110, 125 (1989).

24. *See id.* at 124-25.

25. Battle Robinson & Susan Paikin, *Who is Daddy? A Case for the Uniform Parentage Act (2000)*, 19 DEL LAW 23, 24 (2001). Three general policies support this rule:

> [1)] "[T]he best interests of the child. If a child is born into a marriage and establishes a father-child relationship with the husband, it is generally in the child's interest to maintain that relationship as it provides him/her both financial and psychological benefits."
>
> [2)] "[T]he peace and stability of the marital relationship. If a husband and wife hold a child out as a child of the marriage, a stranger who comes forth and alleges to be the father of the child may disrupt the marriage. This is not in the interests of the husband and wife, the child or the society as a whole."
>
> [3)] "[T]he public fisc. If a husband successfully challenges the paternity of a child thought to be his, the child might well need public assistance to replace the lost financial support the husband had provided."

Id. (quoting Paula Roberts, *Biology and Beyond: The Case for Passage of the New Uniform Parentage Act*, 35 FAM. L.Q. 41, 53 (2000)).

proof of the husband's impotence, sterility, or lack of access to the wife during the calculated period of conception.[26]

In 1777, the societal desire to eliminate illegitimacy manifested itself through Lord Mansfield's Rule, which brought an end to spouses testifying against one another. The declarations of a husband or wife could not be used to bastardize a child born during the marriage.[27] Children born *out of wedlock* however, were left fatherless in the eyes of the law as there were no applicable presumptions. Paternity actions could be brought, but in the absence of genetic testing capabilities, the outcome would depend solely on the man's access to the woman during the time of the child's conception. It was her word against his, and the burden of proof rested on the mother.[28] This system typically left the child illegitimate and without access to financial support.

Beginning in 1968, the United States Supreme Court handed down a number of decisions that eliminated the distinctions between children born to married mothers and those born to unmarried mothers.[29] These decisions seem to rest on the rationale that the illegitimate child, by virtue of a status for which he is not responsible and which has no relation to his worth as an individual, has been the object of discriminatory legal doctrines having no substantial social purpose.

B. The Uniform Parentage Act of 1973

In 1973, the National Conference of Commissioners on Uniform State Laws enacted the Uniform Parentage Act ("UPA 1973") in order to promote the equalization of legitimate and illegitimate children in the eyes of the law. This Act revolutionized the means for establishing paternity and ensuring child support for children who would otherwise have been illegitimate under the common law. The message was simple and clear: "The parent and child relationship extends equally to every child and every parent, regardless of the marital status of the parents."[30] Believing this message to be mandated by the Constitution, the drafters devised the UPA 1973 to replace those state laws that

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26. *Michael H.*, 491 U.S. at 124.

27. Voss v. Shalala, 32 F.3d 1269, 1272 n.3 (8th Cir. 1994). Lord Mansfield's Rule of 1777 was first proclaimed in *Goodright v. Moss*, 98 Eng. Rep. 1257, 1258 (K.B. 1777). *But see* Serafin v. Serafin, 258 N.W.2d 461, 462 (Mich. 1977) (allowing husband to present evidence to rebut presumption of legitimacy of child, and stating that Lord Mansfield's Rule is widely accepted, but can no longer be strictly enforced).

28. *See* IRA ELLMAN ET AL., FAMILY LAW: CASES, TEXT PROBLEMS 891-92 (2d ed. 1991).

29. *See, e.g.*, Levy v. Louisiana, 391 U.S. 68, 72 (1968) (holding that a Louisiana wrongful death statute was unconstitutional because it discriminated against illegitimate children by prohibiting them from recovering for the wrongful death of their mother); Glona v. Am. Guarantee & Liability Ins. Co., 391 U.S. 73, 75-76 (1968) (holding that the same Louisiana wrongful death statute was unconstitutional because it barred a mother's recovery for the wrongful death of her illegitimate child); Gomez v. Perez, 409 U.S. 535, 538 (1973) (guaranteeing an illegitimate child the right to support from his natural father).

30. UNIF. PARENTAGE ACT § 2 (1973).

were unconstitutional or under constitutional scrutiny.[31]

Although the UPA 1973 provides for the establishment of a parent-child relationship with the "natural" father,[32] what the drafters meant by the term "natural" father is not clearly defined. Did the early drafters envision biological fathers as the only ones to whom the rights and responsibilities of fatherhood could extend? The Act has been interpreted as "identifying the birth mother and the natural (read genetic) father as the legal parents, except for the case of adoption."[33]

In addition to the narrow presumptions found at common law, the UPA 1973 sets forth various circumstances in which a man was presumed to be the "natural" father.[34] The majority of presumptions require the man to be married to the mother at some point, and leave little room for non-marital fathers to be the presumed father.

In the minority of states that adopted the UPA 1973, there are, however, additional ways for paternity to be *presumed* through conduct which does not require marriage.[35] If, "while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child" he is presumed to be the child's father.[36] The presumption governs, unless rebutted, but does not establish legal paternity.[37] The same applies to a voluntary acknowledgment of paternity under the UPA 1973, which creates a presumption rebuttable by "clear and convincing evidence."[38] Thus, the presumption arising from a paternity acknowledgment under the UPA 1973 is more easily challenged than that created out of a marriage, because it is not equivalent to legal paternity and is subject to rebuttal.[39]

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31. *Id.* prefatory cmt.

32. *Id.* § 3.

33. Uniform Law Commissioners, *Summary UPA 2002*, Introductions and Adoptions of Uniform Acts, *at* http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-upa.asp (last visited Jan. 20, 2005).

34. UNIF. PARENTAGE ACT § 4.

35. Roberts, *supra* note 9, at 36.

36. UNIF. PARENTAGE ACT § 4(a)(4).

37. A child born during marriage is presumed legitimate. This presumption is not conclusive although it may be rebutted only by direct, clear, and convincing evidence. *See, e.g.*, R.D.S. v. S.L.S., 402 N.E.2d 30, 31 (Ind. Ct. App. 1980).

38. UNIF. PARENTAGE ACT § 4(b).

39. Any interested party was permitted to bring an action at any time to determine the existence or non-existence of the father-child relationship *presumed* under section (4) or (5). *Id.* § 6(b). *Compare id.* § 6(a):

> A child, his natural mother, or a man presumed to be his father under Paragraph (1), (2), or (3) of Section 4(a), may bring an action (1) at any time for the purpose of declaring the existence of the father and child relationship presumed under Paragraph (1), (2), or (3) of Section 4(a); or (2) for the purpose of declaring the non-existence of the father and child relationship presumed under Paragraph (1), (2), or (3) of Section 4(a) only if the action is brought within a reasonable time after obtaining knowledge of relevant

II. TITLE IV-D

A. Voluntary Acknowledgments of Paternity

Title IV-D established a child support enforcement program in which a primary goal was to establish paternity.[40] In exchange for federal funding, Title IV-D requires states to establish informal procedures for establishing paternity. Today, as a condition for receipt of federal funding under Title IV-D, states must have an approved plan for child and spousal support that meets all the requirements of 42 U.S.C. § 654. Title IV-D provides in relevant part: "A State plan for child and spousal support must . . . provide services relating to the establishment of paternity or the establishment, modification, or enforcement of child support obligations, as appropriate, under the plan . . . ."[41] States must have expedited paternity establishment procedures, both non-judicial and judicial,[42] and all states must implement a procedure by which a man can voluntarily acknowledge his paternity.[43]

Informal procedures may be administered in the hospital at the time of the child's birth, or later in an appropriate state agency's offices. However, both the mother and the putative father "must be given notice, orally, or through the use of video or audio equipment, and in writing, of the alternatives to, the legal consequences of, and the rights and . . . responsibilities that arise from, signing the acknowledgment."[44] Ultimately, in creating a non-judicial means for fathers to obtain legal paternity, Congress devised a way to save time and money by eliminating the need to go before a court to receive a final paternity judgment. California's family code summarizes the primary government objective:

> A simple system allowing for establishment of voluntary paternity will result in a significant increase in the ease of establishing paternity, a significant increase in paternity establishment, an increase in the number of children who have greater access to child support and other benefits, and a significant decrease in the time and money required to establish paternity due to the removal of the need for a lengthy and expensive court process to determine and establish paternity and is in the public interest.[45]

The voluntary acknowledgment becomes a "legal finding of paternity," and

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facts, but in no event later than [five] years after the child's birth. After the presumption has been rebutted, paternity of the child by another man may be determined in the same action, if he has been made a party.

40. 42 U.S.C. § 651 (2000).
41. *Id.* § 654(4)(A).
42. *Id.* § 666(a)(2); 45 C.F.R. § 302.70(a)(2)-(5)(iii) (2004).
43. 42 U.S.C. § 666(a)(5)(C).
44. *Id.* § 666(a)(5)(C)(i).
45. CAL. FAM. CODE § 7570(b) (West 2004).

a signatory has only sixty days to rescind the acknowledgment.[46] Once the sixty day time limit has expired, a paternity affidavit can only be challenged in court on the "basis of fraud, duress, or material mistake of fact, with the burden of proof upon the challenger."[47]

B. Minimum Requirements

The Secretary of the Department of Health and Human Services is responsible for devising and regulating the services offered by hospitals and birth record agencies,[48] and must identify other state bodies authorized to offer voluntary paternity acknowledgments.[49] The only formalities associated with this voluntary acknowledgment concern the substance of the affidavit and what notice must be given to the mother and father at the time of signing. Under Title IV-D, the minimum requirements are the inclusion of the parent's social security numbers and any elements found to be "common" to the States.[50] Although the intention was to keep the procedure informal, the Department of Health and Human Services felt that higher notice requirements were warranted in order to equate a paternity acknowledgment to a final judgment and to ensure that potential fathers were aware of the legal consequences of their actions.

Beginning in 1996, the Department of Health and Human Services created a task force to recommend the minimum data requirements.[51] The goal of this group, comprised of both federal and state actors, was to create a tool that was both "user-friendly"[52] and comprehensive.[53] Although a voluntary paternity acknowledgment establishes legal paternity at the time of execution, the information may be needed in the future to establish child support orders. In order to create such a tool, the group reviewed existing paternity affidavits from every state, identifying the common elements, and distinguishing between those that must be required and those that could be optional.[54] Based on the task force's recommendations, in 1998 the Office of Child Support Enforcement established the minimum data requirements that must be included in all state paternity affidavits.[55] Mandatory data includes the names and birth dates of the mother, father, and child, the social security numbers and addresses of the mother

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46. 42 U.S.C. § 666(a)(5)(D)(ii)(I).

47. *Id.* § 666(a)(5)(D)(iii).

48. *Id.* § 666(a)(5)(C)(iii)(II)(aa).

49. *Id.* § 666(a)(5)(C)(iii)(II)(bb).

50. *Id.* § 652(a)(7).

51. Office of Child Support Enforcement, U.S. Department of Health & Human Services, Action Transmittal, OCSE-AT-98-02 (Jan. 23, 1998), *available at* http://www.acf.hhs.gov/programs/cse/pol/AT/at-9802.htm (explaining the "[r]equired [d]ata [e]lements for [p]aternity [a]cknowledgment [a]ffidavits" to "State Agencies administering child support enforcement plans approved under Title IV-D of the Social Security Act").

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

and father, and the birthplace of the child.[56] In addition, there must be notice of the legal significance of the acknowledgment and the sixty day rescission period, signed by both parents indicating their understanding of the "rights, responsibilities, alternatives and consequences."[57] The group also identified information that, although important, is left to state discretion.[58]

III. THE UNIFORM PARENTAGE ACT OF 2000, AMENDED IN 2002

Although the UPA 1973 was instrumental in establishing the paternity of children born out of wedlock, a gap in protection of rights remained with respect to unwed fathers.[59] In 2000, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Parentage Act of 2000 ("UPA 2000"), and made it their "official recommendation . . . on the subject of parentage," superceding all previous uniform acts on the subject.[60] The UPA 2000 was amended in 2002 ("UPA 2002") in response to objections by the American Bar Association Section of Individual Rights and Responsibilities and the American Bar Association Committee on the Unmet Legal Needs of Children, concerning insufficient provisions to deal with the continued inequality of illegitimate children.[61]

Specifically, the amended version adopted additional presumptions of paternity that were not found in either the 1973 or 2000 versions, and are not contingent upon marriage.[62] Although the general goal has not changed since 1973, the UPA 2002 is "both more streamlined and comprehensive than the original"[63] in response to the realities of modern society, including artificial reproduction procedures, adoption and gestational agreements.

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56. *Id.*

57. *Id.*

58. *Id.* Of these optional elements, the following are strongly recommended: 1) Sex of Child; 2) Father's Employer; and 3) Maiden Name of Mother. *Id.* Additional information specified as optional is: 1) Daytime Phone Number; 2) Birthplace (mother and father); 3) Ethnicity of Father; 4) Medical Insurance; 5) Place Where Acknowledgment or Affidavit was Completed; 6) Offer of Name Change (child); 7) Minors: Signature Line for *Guardian Ad Litem* or Legal Guardian; 8) Three-Way Signature Offered on Form (husband, wife and biological father); 9) An advisory to parents that they may wish to seek legal counsel or obtain a genetic test before signing; and 10) A statement concerning the custody status of the child vis-à-vis State law. *Id.*

59. Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 557 (2000).

60. UNIF. PARENTAGE ACT prefatory note (2000). Previous Uniform Acts include the UPA 1973, the UNIFORM PUTATIVE AND UNKNOWN FATHERS ACT (UPUFA 1988), and the UNIFORM STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT (USCACA 1988). The latter two were recommended to be withdrawn and replaced by the UPA 2000. *Id.*

61. UNIF. PARENTAGE ACT prefatory note (amended 2002).

62. *Id.* § 204(a).

63. Press Release, National Conference of Commissioners on Uniform State Laws, New Uniform Parentage Act Now Available (Nov. 25, 2002), *available at* http://www.nccusl.org/Update/DesktopModules/NewsDisplay.aspx?ItemID=84.

Although states have discretion in deciding whether or not to adopt some or all of the UPA 2002, there are sections driven by Title IV-D which *are* required for all states.[64] The all-encompassing nature of the federal act renders it nonspecific, such that the UPA 2002 aims to serve as a supplement, complete with clear and comprehensive procedures for compliance. The United States government believes that a "simple civil process for voluntarily acknowledging paternity"[65] will increase the amount of child support collected, especially from non-marital fathers.[66] In promoting this federal aim, the UPA 2002 encourages states to adopt non-judicial procedures to establish paternity early in the child's life.

Legal paternity may in fact be the most substantial issue that differentiates the UPA 1973 from the UPA 2002, in which a legal father-child relationship is established when a man voluntarily acknowledges his paternity.[67] A voluntary acknowledgment of paternity is to be treated as "equivalent to an adjudication of paternity,"[68] not merely a presumption of paternity as it was under the UPA 1973.[69] A man who fulfills the requirements of Article 3 becomes the legal "acknowledged father."[70]

IV. THE BIOLOGY FACTOR

In its effort to simplify paternity establishment through voluntary acknowledgments, Title IV-D ignored one salient question—whether paternity affidavits are intended only for biological fathers. Under both the federal statute and the UPA 2002, a man may voluntarily acknowledge his paternity as long as the mother consents. Neither Title IV-D nor the UPA 2002 requires a genetic test prior to the establishment of paternity, an indication that the "acknowledged father" may not always be the genetic father.

Whether Congress intended to create a means by which a child born out of wedlock, and to an unconcerned "genetic" father, can still have a father-child relationship with his "acknowledged" father is a principal question facing courts in cases to disestablish paternity after the sixty day rescission period.[71] Courts

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64. UNIF. PARENTAGE ACT § 304 (compare to 42 U.S.C. § 666(a)(5)(C)(i) (requiring a "simple civil process" for voluntary acknowledgment of paternity)); UNIF. PARENTAGE ACT § 305 (compare to 42 U.S.C. § 666(a)(5)(D)(ii) (requiring that an acknowledgment of paternity be a legal finding of paternity) and 42 U.S.C. § 666(a)(5)(M) (directing that acknowledgments be filed with the state registry of birth records)).

65. 42 U.S.C. § 666 (a)(5)(C)(i) (2000).

66. UNIF. PARENTAGE ACT art. 3 cmt. (amended 2002).

67. *Id.* § 302(a)(5).

68. *Id.* § 305(a).

69. UNIF. PARENTAGE ACT § 4(5) (1973).

70. UNIF. PARENTAGE ACT § 102(1) (amended 2002).

71. *See* Faucheux v. Faucheux, 772 So. 2d 237, 239 (La. Ct. App. 2000) (A man may proceed with an action to rescind his previous acknowledgment of paternity of his wife's daughter, who was born before their marriage, where the man claimed that even though he knew he was not the child's father, he signed the affidavit anyway because his wife threatened to take their son to another state.

are divided as to whether a voluntary paternity acknowledgment should be binding on non-biological fathers and biological fathers alike and whether genetic proof is enough to release a non-genetic father from all responsibility.[72] Courts have also addressed situations in which non-biological fathers were aware of their status at the time they executed the acknowledgment.[73] These ongoing questions result in wholly inconsistent state court decisions, handed down on a case-by-case basis.[74] In response, the UPA 2002 seeks to elaborate on some of the gaps left by Title IV-D.

Title IV-D does not call for the acknowledging man to assert his *genetic parentage* of the child. However, in order to prevent circumvention of adoption laws, UPA 2002 makes this distinction explicit,[75] by requiring that he swear under oath that he is the genetic father.[76] In executing a paternity acknowledgment, "both the man and the mother acknowledge his paternity, under penalty of perjury, without requiring the parents to spell out the details of their

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The court found that a paternity affidavit is a nullity if the affidavit is executed by someone other than the biological father.); State *ex rel.* W. Va Dep't of Health & Human Res., Child Support Enforcement Div. v. Michael George K., 531 S.E.2d 669, 677 (W. Va. 2000) (The court held that a challenge to the affidavit after the sixty-day period based on fraud, duress, or material mistake of fact is simply a threshold matter which does not *require* that the affidavit be set aside. Rather, once the threshold is met, the court must then determine whether setting the affidavit aside is in the child's best interest.).

72. *See In re* C.A.F., 114 S.W.3d 524 (Tenn. Ct. App. 2003). In *C.A.F.*, the trial court erred in holding that the state could not challenge the validity of a man's acknowledgment (in a paternity affidavit) of his paternity of a child of whom he was not the father. The court observed that the affidavit statute contemplates challenges to paternity on the basis of fraud, duress or material mistake of fact. *Id.* at 529. Pointing out that the man has acknowledged that he is not the child's father, the court found that fraud was involved in the execution of the paternity acknowledgment. *Id.* Even if the man believed he was the father, genetic tests show that such belief was a mistake of fact. *But see In re* Paternity of J.A.C., 734 N.E.2d 1057, 1060 (Ind. Ct. App. 2000) (Robb, J., concurring) (Execution of a paternity affidavit establishes paternity, and thus it was "completely unnecessary" for the father to have to prove his paternity in a later paternity action.).

73. *See* Seger v. Seger, 780 N.E.2d 855, 857 (Ind. Ct. App. 2002) (Where the acknowledging man knew he was not the biological father but nevertheless executed the legally binding affidavit, the court found that the execution of the paternity affidavit was "fraudulent" because both affiants knew the man was not the biological father.).

74. *See supra* notes 71-73; *see also In re* Paternity of B.N.C., 822 N.E.2d 616, 619-20 (Ind. Ct. App. 2005) (Where acknowledging man was "certain" that he was child's biological father at the time he executed the paternity affidavit, and the mother was "pretty sure" that he was the child's biological father, although she "did have a doubt," the court held that the putative father failed to establish that they engaged in a "deliberately planned and carefully executed scheme" to improperly influence the trial court to issue the paternity judgment.).

75. UNIF. PARENTAGE ACT § 301 (amended 2002).

76. *Id.* §§ 301-302.

sexual relations."[77] The rationale of this section is to deter men from lying and to avoid the added formalities of witnesses and notaries which would be at odds with the goal of making this a simple, informal process.[78]

V. DISESTABLISHMENT OF PATERNITY

Both Title IV-D and the UPA 2002 have the potential to eliminate the number of actions brought to disestablish paternity (to release the once legal father from all duties and responsibilities that came with such status). This would not only serve the best interests of the child but also the economy of the court. It is plausible that the government intended this result when it enacted the informal procedure whereby a voluntary acknowledgment of paternity creates a legal finding of paternity. In 1973 the drafters of the UPA had the foresight to expect that "the pre-trial procedure envisaged by the [UPA 1973] . . . will greatly reduce the current high cost and inefficiency of paternity litigation."[79] Thus one of the goals of the original UPA was to create a means to establish paternity that would not be subject to future litigation.[80]

Under the UPA 2002 a challenge to a valid acknowledgment of paternity must be brought within the sixty day rescission period. An action brought after the sixty day period can only be brought on the grounds of "fraud, duress, or mistake of fact."[81] Under Title IV-D, although there is no prescribed time limit within which the challenge must be brought, the terms are the same, and they specify that the action must be brought "in court."[82]

A. State Compliance with Title IV-D

Although states are required to enact Title IV-D legislation, there is no requirement for the adoption of the UPA 2002. Therefore, where IV-D language may be ambiguous or unclear, the states are left to individual interpretation.[83] Given that only four states have enacted the UPA 2002 in its entirety, there is little consistency among the states in the execution of Title IV-D mandates.[84]

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77. *Id.* § 301 cmt.

78. *Id.* § 302 cmt.

79. UNIF. PARENTAGE ACT prefatory cmt. (1973).

80. *Id.*

81. UNIF. PARENTAGE ACT § 308(a)(1) (amended 2002).

82. 42 U.S.C. § 666(a)(5)(D)(iii) (2000).

83. For example, under Maryland Family Statute section 5-1028, the required elements for a voluntary acknowledgment of parentage are stricter than those called for by Title IV-D. Maryland requires that parents swear under penalty of perjury that the information on the affidavit is truthful, including the mother's consent to the assertion that the man is the only possible father, and the father's acknowledgment that he is the natural father. MD. CODE ANN. FAM. LAW § 5-1028(v)-(vii) (2004). Although Maryland has not adopted the entire UPA 2002, it subscribes to the genetic requirements specified under UPA 2002 sections 301 and 302.

84. Uniform Law Commissioners, *A Few Facts About the Uniform Parentage Act*, *at* http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-upa.asp (last visited Feb.27, 2005).

Challenges to paternity acknowledgments have essentially been left to state discretion. Although most states provide some statutory guidance as to how these challenges should be handled, there are no set definitions for fraud, duress, or mistake of fact, nor are these rules as to how these standards should be applied to the facts.[85] Most states do not set a time limit on a parent's right to challenge a paternity acknowledgment based on these grounds.[86] However, some state legislatures impose time limitations from the date of the child's birth or execution or filing of the acknowledgment.[87] Other states focus on when the father discovered or should have discovered that he was not the biological father.[88] "Still others specifically reference Rule 60 of the Federal Rules of Civil Procedure (or the state equivalent), which depending on the section invoked, requires action within a specific time frame or a 'reasonable time.'"[89] Certain state legislatures have enacted laws that authorize a man to bring a challenge based on genetic testing which excludes him as the biological father.[90] Those states without statutory guidance have used judicial discretion to disestablish paternity.[91]

As the number of actions to disestablish paternity rise, there is fear among states that these individual practices may conflict with Title IV-D, rendering states ineligible for the federal funds provided by the statute. In response, the Office of Child Support Enforcement sent a memo to State IV-D Directors in 2003 addressing their concerns and providing federal guidance.[92] The memo stated that Title IV-D does not require a state to provide services to disestablish paternity, but that "federal IV-D funding would be available at 90 percent for genetic testing and at 66 percent for reasonable and necessary expenditures incurred" by a IV-D agency in dealing with an action brought to challenge a voluntary acknowledgment of paternity based on fraud, duress or mistake of fact.[93]

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85. *See* Roberts, *supra* note 9, at 44 n.51.

86. *Id.* at 44. Title IV-D does not advocate a time limit within which a challenge must be brought on the grounds of fraud, duress or mistake of fact.

87. *Id.* (citing IOWA CODE ANN. § 600B.41A(3)(a) (West 2002) (requiring the action be filed before the child attains the age of majority); N.D. CENT. CODE § 14-19-10(2) (2003) (requiring the action be filed within one year of execution of acknowledgment); TEX. FAM. CODE ANN. § 160.308(a) (2002) (requiring the action be filed within four years of filing); WASH. REV. CODE ANN. § 26.26.335(b) (2002) (requiring the action be filed within two years of filing)).

88. Roberts, *supra* note 9, at 44 (citing MINN. STAT. ANN. § 257.75(4) (2002) (providing that a man has one year from the time of filing the acknowledgment or six months from the time he discovers that he is not the genetic father, to file)).

89. *Id.* at 45 (citing VT. STAT. ANN. tit. 15, § 307(f) (2002)).

90. *Id.* (citing MD. CODE ANN., FAM. LAW § 5-1038(a)(2)(ii) (2003)).

91. *See* State *ex rel.* W. Va. Dep't of Health & Human Res., Child Support Enforcement Div. v. Michael George K., 531 S.E.2d 669 (W. Va. 2000).

92. Memorandum from the Office of Child Support Enforcement to the State IVD Directors (Apr. 28, 2003), *available at* http://www.acf.hhs.gov/programs/cse/pol/PIQ/piq-03-01.htm.

93. *Id.*

B. The Competing Social Policies that Underlie the Paternity Debate

The voluntary paternity affidavit presents complex questions concerning the notion of fatherhood—namely, whether biological fathers should be the only fathers, aside from adoptive fathers, to have rights and responsibilities in a child's life. At the heart of this issue is the tension between two competing social policies. Both sides argue that the child's best interest is the driving force behind the policy. On one side there is the argument that only biological fathers should be allowed to assume the role of the father. Proponents of this biological certainty policy represent the notion that people have a primal affinity for their natural offspring and that the biological father will naturally serve his child's best interests.

Opponents argue that paternity determinations should be left alone, not disturbing the child's established relationship with the only father he has ever known. Proponents of this position argue that stability, enforcement of agreements, executed paternity declarations, finality of judgments, and clarity and consistency in the law ultimately serve a child's best interests.

Although state legislatures generally focus on biological ties as the sole basis for establishing and maintaining a legal father-child relationship, the courts have been less willing to disestablish paternity in a non-biological father where the child's best interests will not be served by such a determination.[94] However, Indiana courts are an example of the exception, in that they tend to grant and protect the rights of parenthood only for the natural father.[95] "The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring."[96]

On the other hand, "Strong paternity presumptions are grounded in the belief that important social policies may sometimes require a distinction between *legal* paternity and *biological* paternity."[97] There are instances under state law where the social relationship between a man and child would preclude a challenge based on biology.[98] Other states use legal theories such as equitable estoppel to achieve the same outcome by precluding genetic evidence that could effectively rebut the presumption of paternity as it is defined by state law.[99] In *Watts v. Watts*, for example, the Supreme Court of New Hampshire denied the admission of blood tests to show that a man was not the father of two children born during his

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94. Glennon, *supra* note 59, at 550-51.

95. *In re* Paternity of S.R.I., 602 N.E.2d 1014, 1016 (Ind. 1992) (finding that while "stability and finality are significant objectives to be served when deciding status of children of divorce . . . . there is substantial public policy in correctly identifying parents and their offspring").

96. Lehr v. Robertson, 463 U.S. 248, 261-62 (1983).

97. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 3.03 cmt. d (May 16, 2000) (emphasis in original).

98. *Id.* For example, California has implemented a two-year time limit on genetic challenges to a husband's paternity based on the maintenance of the "social parentchild relationship" which trumps biology. *Id.*

99. *Id.*

twenty-one year marriage.[100] Although state law allowed for genetic tests to rebut the presumption of paternity, the court held that

> those rules do not apply in a situation such as this one where defendant has acknowledged the children as his own without challenge for over fifteen years. To allow defendant to escape liability for support by using blood tests would be to ignore his lengthy, voluntary acceptance of parental responsibilities.[101]

C. The Implications of State Discretion

Voluntary paternity acknowledgments can be challenged on the basis of fraud, duress or mistake of fact.[102] As noted above, there is no clear explanation of what this means in the law and it is not clear whether Title IV-D extends the ability to execute paternity acknowledgments to non-biological fathers. Individual state interpretations and judicial decisions illuminate the inconsistencies created by this Title IV-D procedure and mandate reform.

1. Indiana.—The Indiana legislature clearly intended the voluntary acknowledgment process to apply exclusively to biological fathers. The Indiana statute prescribes a procedure whereby a mother and "a man who reasonably appears to be the child's biological father," can execute an affidavit shortly after the birth of a child born out of wedlock, which acknowledges the man's paternity.[103] In addition to the grounds prescribed by Title IV-D as the basis for challenging a paternity affidavit, Indiana allows courts to set aside a voluntary acknowledgment of paternity based on genetic tests that exclude the signatory as the father.[104] It can be inferred from the Indiana statutes that a paternity affidavit by law not only establishes legal paternity but biological paternity as well. In 2001, the legislature amended the statute governing presumptions of biological paternity, to delete the portion that created such presumption in a man who executes a paternity affidavit.[105] Indiana's policies and judicial decisions have

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100. Watts v. Watts, 337 A.2d 350, 352 (N.H. 1975) (citations omitted).

101. *Id. See* Commonwealth *ex rel.* Hall v. Hall, 257 A.2d 269, 271 (Pa. Super. Ct. 1969); Commonwealth v. Weston, 193 A.2d 782, 783 (Pa. Super. Ct. 1963).

102. That is, once the sixty-day rescission period has expired. *See supra* notes 43-44 and accompanying text.

103. IND. CODE § 16-37-2-2.1(b)(1)(B) (2004). Required data elements under the Indiana statute include a sworn statement by the mother attesting that the man is the child's biological father and a statement by the father that he believes to be the child's biological father. *Id.* § 16-37-2-2.1(e)(1)-(2). Indiana has made it a Class A misdemeanor for a woman to "knowingly or intentionally falsely [name] a man as the child's biological father." *Id.* § 16-37-2-2.1. Once it finds that *a man is a child's biological father*, the trial court must "conduct a hearing to determine the issues of support, custody, and visitation." *Id.* § 31-14-10-1.

104. *Id.* § 16-37-2-2.1(k).

105. IND. CODE § 31-14-7-1(3) (1998) was amended by P.L. 138-2001. Subsection (3) now provides that there is a presumption that a man is a child's biological father if he undergoes a

seemingly nullified the goals of Title IV-D, by imposing heightened criteria on the maintenance of the status of legal father.

In *Seger v. Seger*, the Indiana Court of Appeals disestablished paternity on the basis of biology alone.[106] In *Seger*, Rusty and Angela, an out-of-wedlock couple, executed a voluntary affidavit of paternity for Angela's minor son, C.S., despite both knowing that Rusty was not the biological father. The couple subsequently married for a short time and upon dissolution, Rusty sought to disestablish paternity based on biological exclusion.[107] The court found that the execution of the paternity affidavit was "fraudulent" because both affiants knew Rusty was not the biological father.[108] Angela challenged the judgment based on the fact that both she and Rusty signed the paternity affidavit with the intent to make Rusty "the minor child's legal father."[109] Angela asserted that "Rusty voluntarily and knowingly accepted all the rewards and responsibilities relating to C.S. and, therefore, the paternity affidavit [was] valid."[110] Although recognizing that the execution of a paternity affidavit creates a legal presumption that the affiant is the biological father,[111] the appellate court affirmed because neither party reasonably believed that Rusty was the biological father.[112]

Similarly, in *Fairrow v. Fairrow*, the Indiana Supreme Court ignored the policy of supporting stability in legally established relationships between parents and children, stating instead that, "there is a substantial public policy, namely justice, which disfavors a support order against a husband who is not the child's father."[113]

Indiana's strict adherence to biological paternity seems in conflict with Title IV-D, which makes no distinction and seeks primarily to ensure child support.[114] However, on closer look, it is apparent that judicial decisions are not only

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"genetic test that indicates with at least ninety-nine percent (99%) probability that the man is the child's father." IND. CODE § 31-14-7-1(3) (2004).

106. Seger v. Seger, 780 N.E.2d 855, 857 (Ind. Ct. App. 2002).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*; IND. CODE § 31-14-7-1(3) (1998). The statute was amended in 2001, deleting the subsection that said a man is presumed to be a child's biological father if "(3) the man executed a paternity affidavit in accordance with IC 16-37-2-2.1." *See supra* note 108.

112. *Seger*, 780 N.E.2d at 857. Citing Indiana's paternity affidavit statute, IND. CODE § 16-37-2-2.1, the court held that "a man who 'reasonably appears to be the child's biological father'" may execute a paternity affidavit following the birth of a child born out of wedlock. *Id.* The court interpreted Angela's challenge as amounting to Rusty's adoption of C.S., such that he should be bound by the rights and responsibilities of parenthood. However, Indiana does not allow equitable adoption. *Id.* at 858.

113. Fairrow v. Fairrow, 559 N.E.2d 597, 600 (Ind. 1990). Although Fairrow never executed a paternity affidavit, this case is an example of an extraordinary circumstance that would warrant the court's determination of whether paternity should be maintained.

114. 42 U.S.C. § 666(a)(5)(C)(i) (2000).

inconsistent from state to state, but there may be deviations within one state. *Ohning v. Driskill* illustrates this with respect to Indiana.[115]

Ohning supports the establishment of paternity, despite the biological disposition of the father, and in the absence of extraordinary circumstances, advocates the maintenance of paternity.[116] In *Ohning* the child was born while the mother lived with her boyfriend. His name was put on the birth certificate and a paternity affidavit was executed in which both swore under oath that the boyfriend was the child's father, despite the fact that he met the mother after she was already pregnant. The couple subsequently married, but separated four months later. In the marriage dissolution, the mother wanted to disestablish the paternity of the husband while he wanted visitation with the child. The dissolution decree granted the parties joint custody of the child of the marriage.[117] Although the wife asserted that the husband was not the biological father of the child, she never rejected child support from him and continued to represent that the child was in fact a child of the marriage.[118] The court held that:

> In many cases, the parties to the dissolution will stipulate or otherwise explicitly agree that the child is a child of the marriage. In such cases, although the dissolution court does not identify the child's biological father, the determination is the legal equivalent of a paternity determination in the sense that the parties to the dissolution—the divorcing husband and wife—will be precluded from later challenging that determination, except in extraordinary circumstances.[119]

The court found that there were no extraordinary circumstances that would justify the bastardization of the child, thus estopping the wife from attacking the paternity of the child.[120]

2. Massachusetts.—The Supreme Court of Massachusetts has refused to relieve a father of parental responsibility simply because he can prove that he is not a child's biological father.[121] An action to disestablish paternity must be brought within a reasonable time period, and even then such action can only be brought on the basis of fraud, duress or material misrepresentation.[122] The court

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115. Ohning v. Driskill, 739 N.E.2d 161 (Ind. Ct. App. 2000).

116. *Id.* at 163.

117. *Id.*

118. *Id.* at 164.

119. *Id.* (citing Russell v. Russell, 682 N.E.2d 513, 518 (Ind. 1997)).

120. *Id. See* Fairrow v. Fairrow, 559 N.E.2d 597 (Ind. 1990) (finding an extraordinary circumstance to warrant the disestablishment of paternity where the husband learned through externally obtained medical proof eleven years after the child was born, that he could not be the child's biological father). *Fairrow* creates a slippery slope that would allow any man who "happens upon" evidence that excludes him as the child's biological father to have his paternity set aside.

121. *In re* Paternity of Cheryl, 746 N.E.2d 488, 490 (Mass. 2001).

122. *Id.* at 494-97. The UPA 2000 supports this policy—that there is a compelling public interest in finality of paternity judgments, and that a signatory may only bring an action to challenge the voluntary paternity acknowledgment within two years of its execution, and only on the basis of

held that a five and one-half year time period between the father's voluntary acknowledgment of paternity and his action to disestablish paternity was not a "reasonable time" within the meaning of Rule 60(b) of the Massachusetts Rules of Domestic Relations Procedure.[123] The father not only had ample opportunity to seek genetic testing prior to executing the voluntary paternity acknowledgment, but also failed to challenge the judgment at the earliest reasonable opportunity. The court noted that the father knew from numerous sources over the years that he was not the child's biological father, and did nothing in response.[124] In refusing to vacate the paternity judgment, the court also took into account the "substantial relationship" that had developed between Cheryl and the father.[125] In defending its decision, the court stated that "[t]here is a compelling public interest in the finality of paternity judgments."[126] "Social science data and literature overwhelmingly establish that children benefit psychologically, socially, educationally and in other ways from stable and predictable parental relationships," regardless of whether the parental relationship is with a non-biological or non-custodial parent.[127] The court looked to the best interests of the child, holding that Cheryl's interests outweighed any interest of the father.[128]

Unlike the Indiana Court of Appeals in *Seger*, the Massachusetts Supreme Court held that even if the mother knew at the time the father signed the paternity acknowledgment that he was not the biological father, her failure to disclose that information to the court would not amount to fraud on the court.[129] The court defined fraud on the court as a conscious, calculated decision to "interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense."[130] The law places on men the burden to consider carefully the permanent consequences that flow from an acknowledgment of paternity.

3. Louisiana.—In *Faucheux v. Faucheux*, the Louisiana Court of Appeals addressed the question of whether a non-biological parent has a right of action to annul an acknowledgment of paternity that he signed with the full knowledge that he was not the biological father.[131] The mother's husband filed a petition to

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fraud, duress, or material misrepresentation. *Id.* at 495 n.14; UNIF. PARENTAGE ACT § 308(a) (2000).

123. *In re Paternity of Cheryl*, 746 N.E.2d at 496.

124. *Id.*

125. *Id.* at 492.

126. *Id.* at 495.

127. *Id.* at 495 n.15.

128. *Id.* at 497.

129. *Id.* at 498.

130. *Id.* (citing Rockdale Mgt. Co. v. Shawmut Bank, N.A., 638 N.E.2d 29 (Mass. 1994) (quoting Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118 (1st Cir. 1989)).

131. Faucheux v. Faucheux, 772 So. 2d 237, 238 (La. Ct. App. 2000).

disavow paternity or alternatively to void the acknowledgment of paternity, alleging that it was impossible for him to be the child's biological father because he did not meet the mother until after child was born.[132] The court held that in the absence of a biological relationship between the child and the mother's husband, any acknowledgment of paternity is null.[133]

In nullifying the acknowledgment of paternity, the court essentially voided the legal significance of the voluntary paternity acknowledgment and contravened the mandate in Title IV-D. This decision would seemingly carve an exception for every non-biological father who executed a paternity acknowledgment. Unless a biological relationship existed between the child and the man, there would be no basis to uphold the rights and responsibilities undertaken through the acknowledgment.

4. Tennessee: Pre-Trial Evidentiary Hearing.—Under Tennessee law, a party may challenge a voluntary acknowledgment of paternity only if based on "fraud, whether extrinsic or intrinsic, duress, or mistake of fact."[134] The party bringing the challenge must, within five years from the execution of the document, give notice to the other parties, including the Title IV-D agency. Under Tennessee law, a court must hold an evidentiary hearing to determine whether there is "a substantial likelihood that fraud, duress, or mistake of fact existed in the execution of the acknowledgment of paternity,"[135] and if so, the court shall order the genetic testing. Such action is not barred by the five-year statute of limitations "where fraud in the procurement of the acknowledgment by the mother of the child is alleged and where the requested relief will not affect the interest of the child, the state, or any Title IV-D agency."[136]

In *Granderson v. Hicks*, the putative father appealed from a denial of his motion to request genetic testing to determine paternity of the minor child.[137] He alleged that he signed a voluntary consent order in conjunction with the mother of the child, based on her fraudulent representation to him that he was the biological father. He later learned from the mother that the he was not the biological father and he responded by filing a motion to set aside paternity and child support, or in the alternative, for DNA testing to determine genetic paternity. His motion was denied without an evidentiary hearing on the allegations of fraud.[138]

The Court of Appeals of Tennessee touched on the policy considerations underlying the paternity statutes but held that "[t]he interest in determining true

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132. *Id.*

133. *Id.* at 239 (explaining that "if a biological relationship does not exist . . . the acknowledgment was made in contravention of the law, is null and can produce no effects" and finding a right of action for the alleged father to seek to and his acknowledgment of paternity).

134. TENN. CODE ANN. § 24-7-113(e)(1) (West 2004).

135. *Id.* § 24-7-113(e)(2).

136. *Id.*

137. Granderson v. Hicks, No. 02A01-9801-JV-00007, 1998 WL 886559 (Tenn. Ct. App. 1998).

138. *Id.* at *1.

parentage must, of course, be weighed against the need for stability for the child, particularly in situations in which the child has long believed that the party requesting the blood test was his father."[139] The Court of Appeals of Tennessee reversed the lower court ruling, and held that, pursuant to state law, which reflects the requirements under Title IV-D, parentage testing is mandatory in a contested paternity case, upon the sworn request of a party.[140]

VI. THE BEST INTERESTS OF THE CHILD

Within this mix of policy, state discretion, and law, is one overwhelmingly crucial, yet largely ignored consideration—the child's best interest. As seen above, the competing social policies that underlie the paternity debate both defend their position as promoting the best interests of the child. Yet, this factor contributes to judicial decision-making in paternity cases, even where the end result is to render a child fatherless.

Some courts appoint legal guardians to protect the best interests of a child in a paternity action where the parents' own individual goals may prevent them from identifying the best path for the child.[141] The UPA 1973 mentions "the best interest of the child" as a factor to consider in a pre-trial hearing to a paternity action.[142] The UPA 2002 is, however, silent as to the child's best interest in terms of the voluntary paternity acknowledgment. Similarly, Title IV-D never mentions "the child's best interest" as a factor to consider in determining whether paternity should be disestablished.

In most paternity disestablishment cases, the courts do perform a best interest analysis at some point in the discussion; however, as a multitude of law review articles have repeatedly pointed out, there is no rhyme or reason to such considerations.[143] The best interests of the child should be a factor in a case to disestablish a voluntary paternity acknowledgment, or in other words, a legal finding of paternity.

Returning to the question posed in the beginning of this discussion, what did the federal government intend, and did their lack of clarity as to *who* could execute a voluntary paternity acknowledgment mean that an "acknowledged" father should be accorded the same status as a genetic father? The purpose of

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139. *Id.* at *3. The Court in *Granderson* relied on *Bass v. Norman*, which held that "[T]he purpose of the paternity statute is to require a biological father to support his child." *Id.* at *3 (quoting Bass v. Norman, 535 N.E.2d 587 (Tenn. Ct. App. 1989), which held that "a mother could bring a petition to establish paternity and support against the alleged father even though she was married to another at the time the child was born") (citing Frazier v. McFerrin, 402 S.W.2d 467 (Tenn. Ct. App. 1964)). The common law presumptions of paternity are rebuttable and the goal of the courts in paternity actions should be to identify the biological father. *Id.*

140. *Id.* at *4 (citing TENN. CODE ANN. § 24-7-112(a)(1)(A)-(a)(2)).

141. Glennon, *supra* note 59, at 569 n.167.

142. UNIF. PARENTAGE ACT § 13(a) (1973).

143. *See e.g.*, Roberts, *supra* note 9, at 53. "The concept of 'the best interests of the child' has also been used to argue both for and against paternity disestablishment." *Id.*

this "simple civil process," whereby paternity can be established, child support can be enforced, and children can have legal fathers, should ultimately be to protect the best interests of the child. Thus, perhaps the reason there is no mention of the child's best interests is because the pretense of this procedure is designed to serve this very goal. By cutting down the number of paternity disputes brought in court and by making certain that a man who consents to a voluntary acknowledgment is aware of the legal consequences and responsibilities, the federal government is looking out for the child's best interest from the point the affidavit is signed.

VII. PROPOSED REFORMATIONS TO THE VOLUNTARY PATERNITY ACKNOWLEDGMENT PROCESS AND PATERNITY DISESTABLISHMENT PROCESS

The U.S. government favors the policy of establishing paternity and of securing child support for children born out of wedlock.[144] Title IV-D established the paternity acknowledgment program which ostensibly reduces the number of illegitimate children and the supposed ill effects suffered by the child and society as a result of illegitimacy. This congressional innovation allows men to become *legal fathers* without having to declare that they are in fact the genetic father. The UPA 2002, however, assigns paternity to biological fathers and requires the affiant to swear under penalty of perjury that he is the genetic father.[145] This obvious conflict has led to inconsistencies in state court decision-making, and has allowed individual states to disregard the federal mandate. Unfortunately, the most significant result of the UPA 2002's biological-minded notion of parenthood is to nullify the effect of a legal paternity acknowledgment. As seen in *Faucheux*, the Louisiana court held that any paternity affidavit made by a non-biological father was void.[146] Title IV-D's informal civil process (whereby a child is guaranteed child support and the legal status of legitimacy) is eradicated by these court decisions, voiding the intent of the federal mandate.

In weighing possible solutions to the issue of the voluntary paternity acknowledgment, and what it *should* mean in the eyes of the law, it is important to consider both the government's interest in establishing and in not establishing paternity. First, as previously discussed, the establishment of paternity for a child born out of wedlock not only secures support for the child, but fosters a relationship between the father and child. Paternity creates rights of inheritance and the right to sue for wrongful death. By settling birth records, the bureaucrats are pleased and the child is allowed to receive government benefits such as social security death benefits. Moreover, the government seeks to reduce the social

144. *See* Parness, *supra* note 7, at 59-60.

145. UNIF. PARENTAGE ACT §§ 301, 302 (2002).

146. Faucheux v. Faucheux, 772 So. 2d 237, 239 (La. Ct. App. 2000).

stigma attached to illegitimacy and to eliminate the associated social problems such as poverty, crime and despair.[147]

However, it can be argued that the government has an equal interest in not establishing paternity. The cost associated with paternity establishment is too high, especially taking into account the number of actions to disestablish paternity that result from cases where the man established paternity pursuant to Title IV-D procedures. Additionally, critics would argue that the paternity establishment procedure does not have the desired effect, and that this informal process should be eliminated.[148] Single mothers may argue that having a child out of wedlock is neither a problem nor a social stigma, but instead a sign of self-determination and autonomy in the increasingly modern world.

There is no easy answer to this debate. This issue is tempered by the fact that the federal government, which has an interest in establishing paternity, has created a procedure in the absence of more specific rules or standards. States, adhering to the measures created by Title IV-D, are still free to decide the subsequent paternity actions in an autonomous fashion. It is crucial to remember that the usual post-paternity acknowledgment case is not about who gets to be the legal father, but who gets out of being the legal father. What are the possible solutions and who should ultimately decide the fate of the father who seeks to sever all rights and responsibilities?

A. Eliminate Voluntary Paternity Acknowledgments

One option is to eliminate the voluntary paternity acknowledgment process which allows a man to become the legal father by providing little more than his name and social security number. This argument focuses on the rationale that the associated cost of paternity affidavits is too high and the benefits do not outweigh the burdens. Proponents would argue that voluntary paternity acknowledgments are ineffective because bad parents are inherently bad parents. Merely signing what the government has labeled a legal finding of paternity does not mean that a man will automatically begin to act like a legal father.

However, even if the procedure is nullified, the problem remains. This would mean paternity could only be established by judicial means, and with this shift would come an even greater cost. In creating a non-judicial means to establish paternity the government recognized that the acknowledgments could settle legal relationships, determine inheritance rights, clarify birth records and make more certain the appropriate target for the payment of child support. In the absence of this simple civil process, these results would be diminished as fewer men would go to the trouble of appearing before a court to establish paternity. In addition, the court system itself would be prevented from focusing on the critical issues that require judicial determination.

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147. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 125 (1989).

148. Those in favor of the social policy of establishing paternity *only* in biological fathers would find the current practice to be a failure in that non-biological fathers seemingly have the same access to paternity acknowledgments.

B. Finality of Judgment

The most stringent argument is to rigidly enforce voluntary paternity acknowledgments, even in cases of fraud, duress, or material misrepresentation. This would eliminate any conflicting state judicial interpretations and the need for post-acknowledgment actions to disestablish paternity. One could argue that prior to executing a voluntary paternity acknowledgment the man is apprised of the legal consequences such that he essentially disclaims any right to challenge the affidavit in the future. Proponents of this proposition would argue that stability, enforcement of agreements, executed paternity declarations, finality of judgments and clarity and consistency in the law ultimately serve a child's best interests.

In practice, however, this proposal could lead to harsh and unjust outcomes. As discussed above, the notice requirement associated with the Title IV-D voluntary paternity acknowledgment is minimal and would not be sufficient to uphold a paternity determination where the man was truly "duped" into believing he was the biological father. Additionally, a child's best interest should be considered in a case for paternity disestablishment, and although hard to define, there are situations in which the child's best interest is not best served by strictly enforcing a paternity acknowledgment.

C. Strict Notice Requirements

There must be greater detail in the notice requirement associated with paternity acknowledgments. A man must be sufficiently apprised of the rights and responsibilities associated with this legal finding of paternity.

This solution may alleviate some of the harshness with the above proposition but it is not a viable solution. First, it would be virtually impossible to agree on what elements of notice must exist in order for there to be no legal recourse for the acknowledging man. Second, by instituting these more rigid notice requirements, the process would lose its informal nature. Finally, the heightened formality of the process would be a deterrent to an otherwise willing man.

D. Hearing Officers

Under Florida law, there are provisions to provide for child support hearing officers, to be used in Title IV-D cases, who have the authority to enter child support orders pursuant to a voluntary acknowledgment of paternity.[149] Expanding the role of a hearing officer to not only handle the issue of child support arising from a voluntary acknowledgment of paternity, but also to handle any paternity disputes arising out of such acknowledgment could greatly reduce the amount of paternity actions that go to trial.

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149. FLA. FAMILY L.R.P. ANN. 12.491(e) (West 2004). "A support enforcement hearing officer does not have the authority to hear contested paternity cases," but shall "accept voluntary acknowledgment of paternity and support liability and stipulated agreements setting the amount of support to be paid." *Id.* 12.491(e) & 12.491(c)(3).

Upon agreement as to the amount of child support, the hearing officer submits the recommendation to the court for its final order or a request for further proceedings.[150] Additionally, "[f]indings of fact are included in the recommended order to provide the judge to whom the order is referred basic information relating to the subject matter."[151] Here is a situation where the hearing officer has already met with the parties, has made findings of fact, and has made recommendations to a judge with respect to child support. The hearing officer is in the ideal position to handle any subsequent paternity dispute through the same channels.

Assume a couple executed an acknowledgment of paternity in 2002, and in 2004, long after the sixty day rescission period is over, the mother seeks to disestablish paternity in the now legal father. She is limited by Title IV-D to claims arising out of duress, fraud, or material misrepresentation. A hearing officer could hear the mother's claims, the father's response and even sit with the child to weigh the child's best interests, before making additional findings of fact and an ultimate recommendation to the presiding judge. The hearing officer could handle all preliminary matters in determining whether there were adequate grounds for the case to go before the judge.

This proposal adds another administrative layer between the social worker or nurse who proffers the affidavits and the judge, who still makes the final determination. However, this proposal would amount to additional expense and critics would contend that it merely sidesteps the pressing question of whether to maintain the legal rights and responsibilities of parenthood in a man who may not be the child's father.

E. Mandatory Genetic Testing

The requirement that every man undergo genetic testing prior to executing a paternity affidavit is one idea proposed by those in favor of the social policy favoring biology. However, mandatory genetic testing is not required under either Title IV-D or the UPA 2002 as a condition to voluntarily acknowledging paternity. Testing every man before he is allowed to execute an acknowledgment would remove the threat of future actions to disestablish paternity based on biology. This solution would surely decrease the number of paternity disputes brought on the basis of duress, fraud, or material misrepresentation. The answer seems like an easy one, yet Congress purposely ignored this simple addition to its Title IV-D paternity acknowledgment procedure.

The Office of Child Support Enforcement has declared publicly that this practice is prohibited by Title IV-D, in which the procedures concerning voluntary acknowledgments of paternity are specified and do not include

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150. *Id.* 12.491e(4) & 12.491(f).

151. *Id.* 12.491 Commentary, 1988 Adoption.

mandatory genetic testing.[152] The law was enacted so that paternity could be established by a simple civil process in which judicial or administrative procedures are neither permitted nor required to approve a voluntary acknowledgment.[153] The idea is to ensure that an acknowledgment, standing alone, is sufficient grounds for seeking a support order.[154]

The government created an informal procedure to establish paternity, and by adding a mandatory genetic test to this procedure, it would become inherently formal. One of the benefits of creating a non-judicial means to establish paternity was to save time and money required to establish paternity. By requiring a genetic test for each and every man who seeks to acknowledge his paternity, this savings would be void.

Moreover, in following the evolution of paternity laws it becomes apparent that establishing paternity is a fundamental governmental interest and one that warrants a procedure that encourages the establishment of paternity, not one that discourages it. The goal of these government procedures should be to look out for the children and to ensure that their needs are being met. The requirement of

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152. Office of Child Support Enforcement, Department of Health & Human Services, Policy Interpretations, PIQ-03-01 (Apr. 28, 2003), *available at* http://www.acf.dhhs.gov/programs/cse/pol/PIQ/piq-03-01.htm.

> 3. Question: Is federal IV-D funding available for genetic testing offered and provided as part of the voluntary acknowledgment process? If a state requires genetic testing in every out-of-wedlock case, would federal IV-D funding be available for those costs?
>
> Response: Federal IV-D funding is only available for genetic testing in IV-D cases. In addition, under section 45 CFR 304.20(b)(2)(vi), Federal Financial Participation at 66 percent is available for payments up to $20 to hospitals, state birth record agencies, and other entities designated by the state and participating in the state's voluntary paternity establishment program, under 45 CFR 303.5(g), for each voluntary acknowledgment obtained pursuant to an agreement with the IV-D agency. Federal IV-D funding is not otherwise available in non-IV-D cases as part of the voluntary acknowledgment process or in every out-of-wedlock case.
>
> 4. Question: May a court require genetic testing before accepting a voluntary acknowledgment in a IV-D case?
>
> Response: No. Section 466(a)(5)(D)(ii) and (E) of the Act requires states to enact laws requiring the use of procedures under which: (1) a signed voluntary acknowledgment of paternity is considered a legal finding of paternity; and (2) judicial or administrative proceedings are not required or permitted to ratify an unchallenged acknowledgment of paternity. In addition, 45 CFR 302.70(a)(5)(vii) requires procedures under which a voluntary acknowledgment must be recognized as a basis for seeking a support order without requiring any further proceedings to establish paternity.

Id.

153. 42 U.S.C. § 666(a)(5)(E) (2000).

154. 45 C.F.R. § 302.70(a)(5)(vii) (2005).

genetic testing will not only deter men from executing the acknowledgment, but would leave many children illegitimate in the eyes of the law. The man who knows he is not the biological father, but wants to become the legal father despite this fact, is no longer permitted to establish his paternity. Some would argue adoption would be the answer, but if the couple is not married, there is no such alternative. In this hypothetical, the mother is not willing to give up her rights to the child; instead she wants a *legal father* who will support the child both financially, and, in some cases, emotionally. Thus, the genetic test requirement would prevent many children from ever having a legal father to provide for them. This result seems at odds with the goals of Title IV-D as well as the history of illegitimacy in this country.

This proposition creates more problems than it solves. There are instances where it would be best to never disclose that the "father" is not biologically related to the child. The best interests of the child must be considered in each and every potential solution and in this case the "best interests of the child" dictates that there not be mandatory genetic testing.

CONCLUSION

At the heart of the paternity acknowledgment debate is whether a non-biological, but legally "acknowledged father," should be held to have the legal rights and responsibilities of parenthood in the absence of fraud, duress, or material misrepresentation. The answer to this pressing question should be yes. Although there is no one solution that will eliminate the problems associated with paternity establishment, mandating that paternity acknowledgments sustain the weight assigned to them by Congress has the promise of eliminating the injustices currently being handed down from state to state. The government's interest in establishing paternity is well-settled and goes beyond the notion of finding one's biological father.

A man who signs a voluntary acknowledgment of paternity may be "unknowingly, but legally, binding himself to supporting and parenting a child of whom he is not the biological father."[155] In some cases, this non-biological father may have been purposely misled by the mother to believe that he fathered the child. "The probability of this scenario is particularly disturbing considering that recent statistics . . . show that nearly thirty percent of . . . alleged . . . fathers . . . who undergo genetic testing are determined not to be the biological fathers of the children involved."[156] In this instance, Title IV-D provides a remedy allowing the man to contest his paternity on the grounds of fraud.[157] To find otherwise would not only be unconscionable, but would be the ultimate

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155. Anne Greenwood, Comment, *Predatory Paternity Establishment: A Critical Analysis of the Acknowledgment of Paternity Process in Texas*, 35 ST. MARY'S L.J. 421, 425 (2004).

156. *Id.* (citing AMERICAN ASSOCIATION OF BLOOD BANKS, ANNUAL REPORT SUMMARY 4 (2000) ("reporting that 300,626 parentage cases were evaluated by laboratories in 2000, and the overall exclusion rate was 27.9%")).

157. 42 U.S.C. § 666(a)(5)(D)(iii) (2000).

deterrence to a potential father signing voluntary acknowledgment of paternity.

If you change the above scenario slightly so that a man who knows he is not the biological father signs the acknowledgment, then he knowingly and legally binds himself to supporting and parenting a child of whom he is not the biological father. There was no fraud, no duress, and no material misrepresentation. This man has no remedy under Title IV-D, and he is bound by his signature. In this case, the only factor that should weigh in favor of disestablishing his paternity would be if the best interests of the child dictated that he should be removed from his legal responsibilities.

Although the above solution seems simple, who should decide whether there was fraud, duress, or material misrepresentation? In order to reduce the number of adjudicated paternity actions, it would be inconsistent to require every such case to go before a judge. However, Title IV-D states specifically that a contested finding of paternity "may be challenged in court only."[158] In adhering to this mandate, the best solution would be to employ a layer similar in nature to the proposed hearing officer position. The specifics of the position would have to be left to state discretion as personnel and court structure differ by jurisdiction.

In theory this process would be controlled by a "screener." The screener's sole responsibility would be to make factual findings as to whether the complainant had grounds to contest the legal finding of paternity. The findings would be presented to the trial court judge in a recommendation regarding whether there was sufficient evidence to support a paternity action. Similar to the Tennessee law that requires a pre-trial evidentiary hearing to make such a determination,[159] this process would be required before an action to disestablish a voluntary paternity acknowledgment could be officially brought. Included in this factual finding would be an analysis of the best interests of the child. Although a subjective standard, at least this factor would be weighed in the decision-making process.

The most important aspect of this change would be to recognize that certain fundamental principles must guide this new process: 1) after the sixty day rescission period has expired, a man may only bring an action to disestablish his paternity on the basis of fraud, duress, or material misrepresentation; 2) a finding that the acknowledging man is not the biological father is not enough to disestablish paternity; and 3) there are instances in which a child's best interests would be preeminently served by maintaining the paternity of a non-biological father.

The value of this tool could be revolutionary if the federal government was willing to make some adjustments to the current policy. This could mean less paternity challenges and, in turn, less courtroom traffic and expense. Ultimately though, this tool will have the ability to protect the best interests of a child, by implementing a procedure whereby a man knows that once he signs the affidavit, he is bound to his duty. Consistency in the disestablishment procedures will lead to increased finality of judgments and stability in father-child relationships.

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158. *Id.*

159. *See* discussion *supra* Part V.C.4.

LEGACY OF A SCANDAL: HOW JOHN GEOGHAN'S DEATH MAY SERVE AS AN IMPETUS TO BRING ABATEMENT AB INITIO IN LINE WITH THE VICTIMS' RIGHTS MOVEMENT

TIM E. STAGGS*

> How dare our government try to sweep clean such a dirty slate? Such a dirty slate of a person—that was a child molester. It was a shock to me that he was dead, but he lived a life of a criminal and he died as a criminal at the hands of a criminal. How can they put aside for one second what John Geoghan has done?[1]

INTRODUCTION

On August 23, 2003, defrocked Roman Catholic Priest John Geoghan was murdered in his prison cell by a fellow inmate.[2] Geoghan, the primary figure at the center of America's church sex-abuse scandal, was serving a sentence stemming from a guilty verdict at his January, 2002 trial on child sexual abuse charges. Geoghan's conviction is considered a landmark decision in the Catholic Church child sexual abuse scandal because it was the first successful prosecution of a priest many considered to be protected by an epidemic of cover-ups by the Catholic Church.[3]

While at the time of his death, Geoghan had been convicted of only one count of abuse, there were literally hundreds of other claims against him, brought by

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1. Maryetta Dussourd, a mother whose three sons and four nephews were allegedly molested by John Geoghan, reacting to the application of the abatement doctrine to invalidate Geoghan's 2002 conviction for child molestation because he was murdered prior to having an appeal of his conviction reviewed. Brendan McCarthy, *Victims Challenge Voiding Geoghan Record*, BOSTON GLOBE, Aug. 28, 2003, *available at* http://www.boston.com/globe/spotlight/abuse/stories5/082803_victims.htm.

2. Yvonne Abraham, *Geoghan's Death Voids Conviction, Prosecutors Say*, BOSTON GLOBE, Aug. 27, 2003, *available at* http://www.boston.com/globe/spotlight/abuse/stories5/082703_conviction.htm.

3. *The* Boston Globe *Spotlight Investigation, Abuse in the Catholic Church—The Geoghan Case*, *at* http://www.boston.com/globe/spotlight/abuse/geoghan/ (last visited Mar. 7, 2005). This website contains a day-by-day breakdown of the Boston scandal. It is comprised of the newspaper articles covering the scandal that have been printed in the *Boston Globe* to date and additional explanatory and historical commentary only available on the website.

former parishioners accusing Geoghan of molesting them as children.[4] In September 2002, the Boston Archdiocese paid $10 million to settle a suit brought by eighty-six plaintiffs who said Geoghan sexually assaulted them.[5] No fewer than eighty-four civil lawsuits remain pending against him, and it is expected that many of these will be pursued against his estate, despite his death at the hands of a fellow prisoner.[6] However, while Geoghan may be the face of the abuse scandal for many, he is not alone among accused priests. Shortly after Geoghan's conviction, Cardinal Bernard Law, the archbishop of the Boston Archdiocese, released the names of dozens of other priests under his supervision who were known to the Archdiocese to be pedophiles.[7] Tragically, this was only the beginning of the scandal. As it escalated, Cardinal Law, once among the most powerful and revered men in the Catholic Church, was forced to resign from the post he had held for nearly twenty years.[8] The scandal continues to haunt the Catholic Church, and more importantly, the victims affected by the cover-up.

Consequently, it came as a shock to many Americans when the state of Massachusetts announced, in the days after Geoghan's death, that the law required that all charges against him be dropped and that he be legally restored to a status equivalent to "presumed innocence."[9] Massachusetts, along with a majority of states and the federal system, follows a common-law doctrine known as abatement ab initio,[10] which dictates that upon the death of a convicted criminal awaiting appellate review, the conviction of the trial court is to be vacated and the indictment dismissed.[11]

The theoretical underpinnings of the abatement ab initio doctrine are both practical and procedural. In its most basic formulation, the appeals process exists to completely and finally resolve any lingering issues as to a defendant's

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4. *Id.*

5. *Id.*; *see also* Walter V. Robinson & Michael Rezendes, *Geoghan Victims Agree to $10 Million Settlement*, BOSTON GLOBE, Sept. 19, 2002, *available at* http://www.boston.com/globe/spotlight/abuse/stories3/091902_geoghan.htm. More recently and in response to general allegations of abuse against other priests in the Boston Archdiocese, the Church in September 2003, agreed to an $85 million settlement to 552 plaintiffs alleging sexual abuse by Boston priests. *See* Kevin Cullen & Stephen Kurkjian, *Church in an $85 Million Accord*, BOSTON GLOBE, Sept. 10, 2003, *available at* http://www.boston.com/globe/spotlight/abuse/stories5/091003_settlement.htm.

6. *See* Robinson & Rezendes, *supra* note 5; *see also* Abraham, *supra* note 2.

7. *The* Boston Globe *Spotlight Investigation, Abuse in the Church—Cardinal Law and the Laity*, *at* http://www.boston.com/globe/spotlight/abuse/law_laity/ (last visited Mar. 7, 2005).

8. *Id.*

9. Abraham, *supra* note 2; McCarthy, *supra* note 1.

10. Literally, abatement "to the beginning." Abatement ab initio means that all proceedings in a case dating from its inception are abated. The result of this abatement is that a defendant awaiting an appeal is legally restored to a status of presumed innocence and all charges against him are dismissed.

11. Rosanna Cavallaro, *Better Off Dead: Abatement, Innocence, and the Evolving Right of Appeal*, 73 U. COLO. L. REV. 943, 955 (2002).

innocence in a case.[12] Resolution becomes moot, however, when the appellant is no longer living or available to pursue the appeals process.[13] Additionally, there are procedural bases behind the appeals process that are grossly offended if a conviction is left standing where the convicted has not had the opportunity to take advantage of the appeal. When regarded as a right granted to one convicted of a crime, an appeal is a procedural safeguard without which a trial verdict is never properly scrutinized and, thus, cannot be fairly upheld and enforced.[14]

In recent decades, however, a significant majority of states have placed greater weight on the rights of crime victims.[15] This has amplified the debate regarding the appropriateness of abatement ab initio in criminal cases. Interestingly, Massachusetts has been at the center of this controversy before.[16] In 1996, John Salvi III was convicted of terrorist attacks on two abortion clinics

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12. *See id.* at 971-73; *see also* Joseph Sauder, Comment, *How a Criminal Defendant's Death Pending Direct Appeal Affects the Victim's Right to Restitution Under the Abatement Ab Initio Doctrine*, 71 TEMP. L. REV. 347, 350-53 (1998).

13. *See* Sauder, *supra* note 12, at 350 & n.24.

14. Cavallaro, *supra* note 11, at 945-47.

15. Alice Koskela, Casenote & Comment, *Victim's Rights Amendments: An Irresistible Political Force Transforms the Criminal Justice System*, 34 IDAHO L. REV. 157, 158 (1997). Koskela reviews the background of the Victims' Rights Movement and its expansion over the last few decades at both the state and federal levels. The article also discusses a few "hot topic" issues in the area, including the standing of victims' relatives to invoke victims' rights legislation, due process arguments in favor of the defendant, and the rights of victims under some statutes to refuse to submit to defense discovery interview requests.

16. *See* Barry A. Bostrom et al., *John Salvi III's Revenge From the Grave: How the Abatement Doctrine Undercuts the Ability of Abortion Providers to Stop Clinic Violence*, 5 N.Y. CITY L. REV. 141 (2002). This article opens from the viewpoint of Richard Seron, a security guard at an abortion clinic attacked by John Salvi III as part of his intended rampage against such establishments. Seron sustained four gunshot wounds in a close-range shootout with Salvi. As a result of the confrontation, Salvi fled, leaving behind a bag that contained seven hundred rounds of ammunition and other gun paraphernalia which he presumably intended to use to commit a far greater number of murderous attacks on abortion providers (the clinic where Seron worked was Salvi's second target of the day). *Id.* at 146.

At the time of Salvi's suicide, Seron was awaiting several rewards that had been offered for information leading to the conviction of anyone committing serious attacks against abortion clinics. He had been notified that the rewards were being held, pending final disposition of the case against Salvi, i.e., until Salvi's appeals had been heard, to ensure that the conviction would be upheld. *Id.* at 149-50. Salvi's "revenge," then, was that his suicide prevented such disposition, having resulted in the abatement of his conviction under Massachusetts law. Seron was forced to file suit to collect his reward money because, according to those offering the rewards, the final disposition of the case under abatement ab initio did not result in Salvi's conviction! Seron settled out of court under undisclosed terms. Seron's plight provides a stark example of the far-reaching effects of the abatement doctrine, and the various kinds of "victims" that can be affected by its harsh results.

in the state for murdering two women and attempting to kill five others.[17] Salvi appealed the conviction, but committed suicide in prison before his appeal was heard, and, consequently, his conviction was abated[18] in the same manner as Geoghan's. The State of Massachusetts failed to successfully take legislative action to dissolve the doctrine, despite a considerable public outcry.[19] Given the notoriety and scope of the Boston Catholic Church scandal, however, a more determined protest may be anticipated in the fallout of Geoghan's abatement.

This Note provides an overview and analysis of the abatement doctrine as it relates to and offends the popular Victims' Rights Movement. Part I surveys the doctrine of abatement ab initio, covering the federal and state majority viewpoint, that the abatement of proceedings is appropriate upon the death of the convicted. Further, Part I discusses the proposition that the right to final adjudication in the appellate system has come by many to be viewed as a pseudo-constitutional right guaranteed to every criminal defendant. Finally, Part I reviews the two minority viewpoints that have developed through case law as the result of judicial recognition that our sense of justice is often offended by the abatement doctrine.

Part II discusses the Victims' Rights Movement and its prominence in recent decades, and covers the basic form in which the movement has taken hold in the courts and legislatures of most states and the federal system. Included in this section is a coverage of the policy arguments that have been well-received by our courts and our citizens, if not always so well-received by some legal scholars.[20] This Part concludes by suggesting that the uniformity and near-unanimity of Victims' Rights Amendments in this country signals a trend toward a view of the criminal justice system consistent with increased recognition of and sensitivity toward the victims of crimes.

Part III, then, takes into account the arguments against the Victims' Rights Movement specifically related to the abatement doctrine and provides an analysis of the friction between these two polar concepts. This Part demonstrates how courts and legislatures are in the position of being forced to balance the interests of victims and defendants in a system that traditionally has given defendants strong rights, but has recently overwhelmingly declared that the rights given to victims have not been strong enough.

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17. *Id.* at 148.

18. *Id.* at 148-49.

19. McCarthy, *supra* note 1. In the fallout of the Salvi case, a 1997 proposal with the support of then-Governor Weld was unanimously approved in the Massachusetts Senate, but failed to come through in the House of Representatives. Former State Senator William Keating, the bill's sponsor, expressed hope that the amendment would be reintroduced to the Massachusetts legislature as a result of the Geoghan case. *See also* Abraham, *supra* note 2 (noting the failed legislation).

20. Ironically, many scholars suggest that the arguments against victims' rights are often better-organized and more logical than those supporting the movement. While it is important to acknowledge this and provide some balance to the arguments with the essentially morality- and fairness-based arguments in favor of victims' rights, it is important to clarify at this stage that this Note does not attempt to sway the reader in favor of or against the concept of victims' rights. Although that is a worthy topic, it is simply not in the scope of this Note, dealing narrowly with the movement's effect on the doctrine of abatement.

Finally, Part IV returns to the review of the judicial positions in the abatement ab initio discussion, analyzing the need for reconciliation of the rights of a victim with those of a defendant, even when a defendant has died before final closure of his case. This Note concludes that the minority position is actually the better tool available to our developing legal system to fully realize the balance of interests being considered.

I. THE DOCTRINE OF ABATEMENT AB INITIO

A. The Majority View: Death of the Convicted Prior to Appellate Review Abates the Conviction

The majority of United States courts continue to hold that the death of a defendant prior to final appellate review of his case results in the abatement of all proceedings against that defendant.[21] In the federal system, this view is almost unanimous: eleven of the twelve federal appellate courts follow the abatement doctrine, and the Supreme Court has indicated its support for the concept as well.[22] The majority view also receives wide support in the state court system, where most courts endorse the abatement doctrine as the appropriate resolution of a case following the death of the defendant prior to appeal.[23]

A brief review in this section of the cases at each level of the judiciary identifies the common policy concerns behind these opinions and demonstrates the reasoning behind the abatement doctrine in most majority courts. Then, this section covers the two prominent minority views on the subject of abatement and the reasoning behind these views, and postulates that as relatively recent developments in the case law, these opinions indicate a shift in the goals and priorities of the criminal justice system in the United States—a shift subtly but strongly influenced by the Victims' Rights Movement.

1. The United States Supreme Court.—Due to the nature of the appeals process, there is some difficulty in determining the position of the Supreme Court on the abatement doctrine. The doctrine typically is at issue in courts handling a defendant's appeals of right.[24] The Supreme Court, under the certiorari system, grants discretionary appeals.[25] To this point, no crime victim has successfully taken a case against the State to the Supreme Court on the issue of an appeal of right where a defendant's conviction has been abated ab initio.

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21. *See* discussion *infra* notes 26-49 (covering majority opinions in federal and state courts).

22. *See* discussion *infra* notes 35 and 40.

23. *See* discussion *infra* note 44.

24. *See* Bostrom et al., *supra* note 16, at 163 (noting the importance of the distinction between appeals of right and discretionary appeals when applying the abatement doctrine); *see also* Cavallaro, *supra* note 11, at 951-53. For case law clarifying the issue with reference to the Supreme Court's decisions in *Dove* and *Durham*, see *United States v. Moehlenkamp*, 557 F.2d 126 (7th Cir. 1977).

25. *Moehlenkamp*, 557 F.2d at 128.

However, two cases in the 1970s strongly point to the Court's support of the abatement doctrine. In *Durham v. United States*, the Court took the unexpected step of abating all proceedings in a case where a defendant died after petitioning the Court for certiorari, even though his conviction had been upheld at the appellate level.[26] Before *Durham*, it was the usual practice of the Court to dismiss the petition for certiorari and leave it to the lower courts to decide the scope of abatement.[27] The Court in *Durham* noted that the practice of federal courts when dealing with cases on direct appeal was to apply the abatement doctrine and dismiss all prior proceedings against the defendant.[28] Adopting this approach for discretionary certiorari appeals, the Court vacated the judgment of the lower court and remanded with instructions to dismiss the indictment altogether.[29]

However, the Court overruled its surprising decision in *Durham* just five years later in *Dove v. United States*.[30] In a very brief per curiam opinion,[31] the Court simply announced that the death of a defendant results in the dismissal of his petition for certiorari, of course leaving the last appellate decision unchanged. In other words, abatement ab initio does not extend to the discretionary appeals available beyond direct appellate review.[32] The Court acknowledged its decision in *Durham*, stating simply, "[t]o the extent that *Durham v. United States* . . . may be inconsistent with this ruling, *Durham* is overruled."[33]

Given the opaque nature of the *Dove* opinion itself, the legal community is left to divine what it can of the Supreme Court's stand on abatement ab initio from the reasoning behind *Durham*.[34] From *Durham*, it seems that the Supreme

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26. 401 U.S. 481 (1971) (per curiam).

27. *Id.* at 482.

28. *Id.* at 482-83.

29. *Id.* at 483.

30. 423 U.S. 325 (1976) (per curiam).

31. The entire text of *Dove* reads:

> The Court is advised that the petitioner died at New Bern, N.C., on November 14, 1975. The petition for certiorari is therefore dismissed. To the extent that *Durham v. United States* . . . may be inconsistent with this ruling, Durham is overruled.
>
> It is so ordered.
>
> Petition dismissed. Mr. Justice White dissents.

Id. (citation omitted).

32. See Cavallaro, *supra* note 11, for a discussion of the reading of *Dove* by courts confronted with the abatement issue since that decision. With the exception of the Third Circuit, all of the federal appellate courts have determined that the *Dove* decision controls only in cases considering discretionary petitions for certiorari to the Supreme Court, not to those concerning appeals of right. Each circuit court has declined to apply *Dove* to abolish abatement ab initio, instead differentiating between appeals of right and discretionary appeals and holding that an appellant's death prior to the exercise of his right to appeal results in abatement of the conviction ab initio. *See infra* note 40.

33. *Dove*, 423 U.S. at 325.

34. *See* United States v. Moehlenkamp, 557 F.2d 126, 127 (7th Cir. 1977).

Court agreed with the basic tenets of the abatement remedy.[35] The Court acknowledged the effect of the rule, stating that "death pending direct review of a criminal conviction abates not only the appeal but also all proceedings had in the prosecution from its inception."[36] Referring to the use of the doctrine at the appellate level, the Court states, "[t]he unanimity of the lower federal courts which have worked with this problem is . . . impressive. We believe they have adopted the correct rule."[37] When deciding *Dove*, the Court limited the extent to which *Durham* was overruled to the common factors in the two cases: to the application of the doctrine to petitions for certiorari.[38] This limitation suggests that the general language in *Durham* supporting the use of the doctrine at the appellate court level continues to have the support of the Court. Though the Court has not addressed the issue since, the reading of the cases by the appellate courts seems likely to be an accurate one.[39]

2. *Federal Courts of Appeal.*—As the Supreme Court noted in *Durham*, the federal appellate courts demonstrate considerable unity in their approaches to the abatement doctrine. With the exception of the Third Circuit, all of these courts continue to abate all proceedings in a criminal case where the defendant dies pending an appeal of right.[40]

The adherence to abatement ab initio in federal appellate courts is well demonstrated by *United States v. Pogue*.[41] Here, the D.C. Circuit employed the abatement remedy following the defendant's death even though the defendant had pled guilty to the charge he was appealing and there was evidence that the victim

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35. *Id.* at 128.

36. Durham v. United States, 401 U.S. 481, 483 (1971) (per curiam).

37. *Id.*

38. *See Dove*, 423 U.S. at 325.

39. *Durham* does lend some support to the "appeals of right" view now espoused by the majority of courts. In his dissent (on other grounds), Justice Blackmun points out that an appeal of right is procedurally different from an appeal of certiorari. He supported dismissing the petition for certiorari and leaving the conviction to stand. 401 U.S. at 484-85. Some authors suggest that the *Dove* decision can be characterized as the Court's adoption of Justice Blackmun's dissent in *Durham*. Bostrom et al., *supra* note 16, at 163.

40. For federal opinions following the majority view, see, e.g., *United States v. Pogue*, 19 F.3d 663 (D.C. Cir. 1994); *United States v. Mollica*, 849 F.2d 723 (2d Cir. 1988); *United States v. Oberlin*, 718 F.2d 894 (9th Cir. 1983); *United States v. Pauline*, 625 F.2d 684 (5th Cir. 1980); *United States v. Moehlenkamp*, 557 F.2d 126 (7th Cir. 1977); *Crooker v. United States*, 325 F.2d 318 (8th Cir. 1963). For the single federal opinion breaking with the majority analysis, compare *United States v. Dwyer*, 855 F.2d 144 (3rd Cir. 1988), where the court dismissed an appeal not on the basis of abatement ab initio, but instead cited a lack of standing by the attorney seeking abatement. (Interestingly, it is John Geoghan's attorney who is responsible for petitioning the court to abate Geoghan's conviction. *See* McCarthy, *supra* note 1. In the Third Circuit, then, Geoghan's conviction would stand.) As discussed later, some state courts have followed a minority view that allows for substitution of a party following a defendant's death, thereby overcoming the problem cited in *Dwyer*. *See* discussion *infra* notes 68-78 and accompanying text.

41. *Pogue*, 19 F.3d at 663.

intended only to challenge his sentence, or that he planned to voluntarily dismiss his appeal altogether. The court stated the common assertion in support of abatement: that the "principle underlying the abatement rule is that 'the interests of justice ordinarily require that [a defendant] not stand convicted without resolution of the merits' of an appeal."[42] This basic policy argument will be addressed in more detail in a later section of this Note.[43]

3. State Courts.—Most state courts reviewing abatement cases have also adopted the majority opinion followed in the federal system.[44] While the language used in the many state cases varies more than in the federal courts, most of these state decisions follow the same basic principles set forth at the federal level.[45]

In holding for abatement ab initio in the case of a deceased man who had appealed his criminal conviction, the Supreme Court of Iowa is representative of many states' adherence to the majority view in abatement cases. In *State v. Kriechbaum*,[46] that court declared:

> In such a case there is no unsuccessful party; nor a successful one. Defendant's right of appeal inhered in the prosecution from the beginning. His right of appeal was as inviolable as any right of defense. Also his right of suspension of the judgment of the trial court until after the appeal has been heard. The judgment below could not become a verity until the appellant [sic] court made it so by an affirmance. . . . The question of the defendant's guilt was therefore necessarily undetermined at the time of his death. If death abated the action, the question never could be determined. . . . We hold therefore that the death of the defendant abated the action as well as the mere appeal. . . . The criminal action must therefore be deemed as abated in toto or not at all.[47]

Another state case following the majority rationale for the abatement doctrine

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42. *Id.* at 665 (citing United States v. Moehlenkamp, 557 F.2d 126, 128 (7th Cir. 1977)).

43. *See* discussion *infra* notes 50-59 and accompanying text.

44. *See* Hartwell v. State, 423 P.2d 282 (Alaska 1967); State v. Griffin, 592 P.2d 372 (Ariz. 1979); Dixon v. Superior Court, 240 Cal. Rptr. 897 (Ct. App. 1987); People v. Lipira, 621 P.2d 1389 (Colo. Ct. App. 1980); Howell v. United States, 455 A.2d 1371 (D.C. 1983); State v. Stotter, 175 P.2d 402 (Idaho 1946); People v. Robinson, 719 N.E.2d 662 (Ill. 1999) (Robinson II); State v. Kriechbaum, 258 N.W. 110 (Iowa 1934); State v. Thom, 438 So. 2d 208 (La. 1983); State v. Carter, 299 A.2d 891 (Me. 1973); State v. West, 630 S.W.2d 271 (Mo. Ct. App. 1982); State v. Campbell, 193 N.W.2d 571 (Neb. 1972); State v. Poulos, 88 A.2d 860 (N.H. 1952); People. v. Craig, 585 N.E.2d 783 (N.Y. 1991); State v. Boyette, 211 S.E.2d 547 (N.C. Ct. App. 1975); State v. Dalman, 520 N.W.2d 860 (N.D. 1994); Johnson v. State, 392 P.2d 767 (Okla. Crim. App. 1964); State v. Marzilli, 303 A.2d 367 (R.I. 1973); State v. Hoxsie, 570 N.W.2d 379 (S.D. 1997); Carver v. State, 398 S.W.2d 719 (Tenn. 1966); Perry v. State, 821 P.2d 1284 (Wyo. 1992).

45. *See* Bostrom et al., *supra* note 16, at 162.

46. *Kriechbaum*, 258 N.W. at 110.

47. *Id.* at 113.

is *State v. Carter*.[48] In this case, dealing with an appeal from a finding of felonious homicide, Maine's highest court expressed the common concern that a defendant who dies awaiting an appeal could consequently be found guilty of his crime unfairly. The court stated that a "conviction, in fact left under a cloud as to its validity or correctness when . . . death causes a pending appeal to be dismissed, should not be permitted to become a final and definitive judgment of record—thereby to operate as an effective adjudication that defendant was guilty as charged."[49]

B. Abatement Ab Initio: The Underlying Policy of the Right to Appeal

In both state and federal courts, opinions are easily found suggesting that abatement is an appropriate remedy when a defendant dies because the defendant is no longer available to receive his punishment. Professor Cavallaro points out that courts state this in a variety of ways; that "crimes . . . are buried with the offender;"[50] that "the removal of appellant by death has prevented the execution of any sentence;"[51] that "[d]eath withdrew the defendant from the jurisdiction of [the] court;"[52] and that "[there has been a] loss of an indispensable party to the proceeding."[53] Although this is sound reasoning in a certain "common-sense" way, it often does not hold up well to a legal analysis when weighed against the manner in which abatement can offend the victims of an appellant's crimes or the integrity of a judicial decision at the trial stage. If abatement ab initio remains the law, surely a more pressing reason for its use must be articulated.

Professor Cavallaro suggests the most persuasive reasoning behind the majority position. She proposes that the real drive behind the abatement remedy is the right to appeal.[54] She points out that a workable criminal justice system must follow a process that ensures accuracy in determining the culpability of a criminal.[55] Appellate review, she notes, is designed to essentially guarantee such

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48. *Carter*, 299 A.2d at 891.

49. *Id.* at 894.

50. Cavallaro, *supra* note 11, at 954 (quoting United States v. Dunne, 173 F. 254, 258 (9th Cir. 1909)).

51. *Id.* at 956 n.40 (quoting Hartwell v. State, 423 P.2d 282, 284 (Alaska 1967)).

52. *Id.* (quoting *Kriechbaum*, 258 N.W. at 113).

53. *Id.* (quoting *Carter*, 299 A.2d at 894).

54. *Id.* at 945, 954-55. Cavallaro argues in favor of the appeal rationale, and also discusses the simpler proposition that the case simply dies with the defendant. She expertly points out that the appeal rationale is behind even these simpler decisions, though courts often fail to state the connection succinctly. *See also* Sauder, *supra* note 12, at 350-53.

55. Cavallaro states:

> Appeal is, fundamentally, about error correction. Thus, our legal attitude toward the importance of error correction should determine the status of the right of appeal. Because innocence is a bar to punishment under any theory of punishment, appeal is a necessary and effective process of error correction that guarantees that the innocent will not be punished. These propositions should inform the nature of the right of appeal.

accuracy.[56] This Note focuses on this discussion of the right to appeal.

The importance of the right to appeal in the context of abatement cannot be overlooked. If one accepts the basic premise that the purpose of the appeals process is to provide a final and more certain outcome to a case, it is indeed easier to understand the use of abatement where that outcome can no longer be achieved. Where an appeal is used to review and correct errors made at the trial level, the need to preserve the process to perform such a function is obvious.

At the heart of the appeals process is a fundamental concern for the wrongly convicted. When viewed in such a context as the conviction of an innocent man at trial, the appeal serves two functions so important that it is very difficult to justify their neglect: the appeal is the innocent man's opportunity to bring to light the error that led to his conviction and to have that conviction finally nullified, and the appeal serves to redirect our attention to pursuing the real perpetrator of the crime so that the criminal system can bring him to justice.[57] Abatement upon death serves, at least, to preserve the former of these two functions by clearing the name of the defendant who has not yet been confirmed in guilt through the appeals process.

The societal interest in ensuring that a convicted man is actually guilty of his crime has led considerable strength to the right to appeal. One of the more pressing proposals set forth by Cavallaro is that the statutory right to appeal,[58] while not technically a constitutional right guaranteed to criminal defendants, has essentially reached that status within our current legal system.[59] Indeed, it would

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Cavallaro, *supra* note 11, at 971-72.

56. *Id.* at 971-82. Cavallaro discusses the function of appellate review as a guarantor of accuracy in the criminal justice system by analyzing the importance of review under each of the four theories of punishment: retribution, rehabilitation, deterrence, and restitution. She soundly concludes that under any or all of the four theories, the function of appellate review as error correction is indispensable.

57. This latter function, while imperative within our system of justice, does not bear on the subject matter of this Note. It is worthy to point out, however, that even if this function is left to be served following the death of a wrongly convicted defendant awaiting appeal, abatement ignores this function by wiping clean the slate of the defendant without seriously calling his guilt into doubt. In such a case, the true perpetrator of a crime is virtually assured that he will never be discovered.

58. See 28 U.S.C. §§ 1291-1293 (2000) for the federal codification of the appeals process. Additionally, every state provides either constitutionally or statutorily guaranteed appellate review for, at minimum, felony convictions. Cavallaro, *supra* note 11, at 945-46 & n.9.

59. *Id.* at 946-49, 982-86. Cavallaro points specifically to capital cases as a starting block for this contention, noting that the availability of appellate review as a procedural safeguard under a state's death penalty process can be determinative as to the constitutionality of that process. *Id.* at 967 & n.77 (citing Pulley v. Harris, 465 U.S. 37, 55 (1984) (Stevens, J., concurring) ("'some form of meaningful appellate review is required' in capital cases")).

Cavallaro also argues that the right to appeal has become so embedded in our society that it is fundamentally a constitutional due process right. *Id.* She points to the societal expectation of appellate review as being so ingrained that it elevates the procedure to a constitutional status. She

seem that the majority view of abatement, reluctant to give finality to the conviction of even the most clearly guilty man (such as Geoghan), would support such a position. In addressing the minority views on abatement ab initio, then, it is imperative that we keep the gravity of Cavallaro's analysis in mind.

C. The Minority Views

Despite almost unanimous acceptance of abatement ab initio in the federal courts and a strong following in state courts, critics of the doctrine find its results to be unreasonably far-reaching, particularly in that its application restores a convicted defendant to a status of presumed innocence. In addressing the doctrine's shortcomings, two minority opinions have evolved in the state court system.

1. Abolition of Abatement Ab Initio.—Of the two popular minority opinions espoused in state courts, the predominant view simply declines to follow the abatement doctrine, dismisses only the appeal, and allows the conviction to stand as last decided.[60] State courts offer varying rationales for this position. Some point to the historical significance of the conviction, noting that the fact that it has not been fully appealed does not change the fact that an adjudication resulting in a verdict has taken place.[61] Often, courts refer to this rationale as a need to promote confidence in the decisions of our courts.[62] Other states follow the

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cites *Dickerson v. United States*, 530 U.S. 428 (2000), where the Supreme Court acknowledged the evolution of the *Miranda* rule as constitutionally compelled because of the degree to which it is embedded in our culture as an expected part of police practice. *Id.* at 985. The *Dickerson* Court expressly recognized the validity of including social expectation when evaluating the constitutional status of a practice. *Id.* (citing *Dickerson*, 530 U.S. at 438). Noting that all fifty states and the federal courts employ a mode of appellate review, and further that several states provide for such review in their constitutions, Cavallaro draws an appropriate parallel between the societal status of the *Miranda* rule and the status of the right to appeal, suggesting that "[i]t would surprise many Americans to learn that there is, in fact, no right to such review as there is a right to trial by jury and a right not to incriminate oneself." *Id.* at 985-86.

60. *See* Ulmer v. State, 104 So.2d 766 (Ala. 1958); State v. Trantolo, 549 A.2d 1074 (Conn. 1988); State v. Dodelin, 319 S.E.2d 911 (Ga. Ct. App. 1984); Whitehouse v. State, 364 N.E.2d 1015 (Ind. 1977); Royce v. Commonwealth, 577 S.W.2d 615 (Ky. 1979); People v. Peters, 537 N.W.2d 160 (Mich. 1995); *In re* Carlton, 171 N.W.2d 727 (Minn. 1969); State v. Clark-Kotarski, 486 P.2d 876 (Mont. 1971); State v. Kaiser, 683 P.2d 1004 (Or. 1984); Mojica v. State, 653 S.W.2d 121 (Tex. Ct. App. 1983); State v. Christensen, 866 P.2d 533 (Utah 1993).

61. *E.g.*, *Royce*, 577 S.W.2d at 616.

62. Ironically, actual error rates may serve the opposite function, at least with regard to the decisions of lower courts. Cavallaro points to recent studies suggesting rates of error in capital cases approaching fifty percent, with error in non-capital cases estimated around five percent. Cavallaro, *supra* note 11, at 977-78 (citing studies conducted by James S. Liebman and others, reported in James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2052-56 (2000)); *see also* Sauder, *supra* note 12, at 363-64 & n.104 (citing overall error rates as high as fourteen percent in some states).

reasoning of the Third Circuit in Dwyer and dismiss the appeal by citing a lack of standing in anyone but the criminal defendant himself.[63]

The prevailing rationale for rejecting the abatement doctrine, however, seems to be simply that it is outdated and fails to acknowledge that a convicted defendant, even in death, can no longer enjoy the status of a man presumed innocent. A case thoroughly covering this rationale is *People v. Peters*.[64] In a decision overruling Michigan's prior adherence to abatement ab initio, the reasoning of the Supreme Court of Michigan was largely based on its offense at the distorted return to a presumption of innocence afforded by the doctrine.[65] The court cited the rationale set forth by the Indiana Supreme Court:

> The presumption of innocence falls with a guilty verdict. At that point in time, although preserving all of the rights of the defendant to an appellate review, for good and sufficient reasons we presume the judgment to be valid, until the contrary is shown. To wipe out such a judgment, for any reason other than a showing of error, would benefit neither party to the litigation and appears to us likely to produce undesirable results in the area of survivor's rights in more instances that [sic] it would avert an injustice.[66]

Addressing the issue of an appeal of right as opposed to a discretionary appeal, the *Peters* court further stated that "[t]he conviction of a criminal defendant destroys the presumption of innocence regardless of the existence of an appeal of right. We therefore find that it is inappropriate to abate a criminal conviction."[67] Procedurally, courts following this point of view simply dismiss the appeal, leaving the ruling of the lower court to stand without further adjudication.

2. The Moderation Approach: Substitution of a Party for a Final Decision.— A second minority view has also gained a foothold in the state court system. It provides an approach of moderation between the two extreme positions outlined above: the majority view of abatement ab initio, and the primary minority view doing away with the doctrine altogether, leaving the defendant's last court decision to stand unchallenged. This approach declines to automatically apply

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63. *E.g.*, *Kaiser*, 683 P.2d at 1006. Although this rationale has the support of the Third Circuit as well, it does not seem to satisfy many civil court decisions attempting to reconcile this issue in favor of overthrowing abatement. *See supra* note 40. Perhaps this is because courts allow standing to be transferred to third parties following the death of a party. As in those cases, it is difficult to argue that the deceased, having wished to pursue the action when living, does not benefit from the inclusion of the third party in the proceeding following his death.

64. *Peters*, 537 N.W.2d at 160.

65. The court also relied heavily on the then-recent enactment of its Victims' Rights Act to justify abolishing the abatement doctrine. *See* discussion *infra* note 84 and accompanying text. However, a reading of the case suggests the "presumed innocence" argument alone was considered sufficient by this court to justify abolishing the doctrine, as the case does not directly address Michigan's VRA until after the court announces its overruling of abatement.

66. 537 N.W.2d at 164 (citing Whitehouse v. State, 364 N.E.2d 1015, 1016 (Ind. 1977)).

67. *Id.* at 163.

abatement ab initio to a conviction, but acknowledges the rights of a criminal defendant by allowing another party to pursue that defendant's right to appellate review.[68]

The rationale behind this solution purports to preserve the status quo of the criminal justice system by allowing a case already adjudicated at the trial level to follow a natural progression through the appellate process even without the defendant's presence.[69] The Supreme Court of Hawaii, in *State v. Makaila*,[70] provided a comprehensive analysis of this approach in comparison to the positions discussed above. *Makaila* overruled the court's long-standing majority-position precedent, *State v. Gomes*,[71] stating that "it seems unreasonable automatically to follow the abatement ab initio rule and pretend that the defendant was never indicted, tried, and found guilty."[72] The court balanced this concern, however, in acknowledging the defendant's interest in having an appeal heard: "Similarly, outright dismissal of the appeal—without the possibility of a review of the merits—seems equally unacceptable."[73]

In adopting the moderation approach, the *Makaila* court seemed keenly aware of the difficulty posed by a convicted defendant's return to the presumption of innocence as a matter of public policy. Citing the Ohio Supreme Court when it adopted the moderation approach, the court noted:

> To accept [the majority position] would require us to ignore the fact that the defendant has been convicted and, therefore, no longer stands cloaked with the presumption of innocence during the appellate process. Such a holding would not be fair to the people of this state who have an interest in and a right to have a conviction, once entered, preserved absent substantial error.[74]

Remaining mindful, as well, of the defendant's interest in the right to appeal,[75] the *Makaila* court found the moderation approach to be "a fair compromise between the competing interests" at issue.[76] The court held that upon the death of a

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68. *See* State v. Clements, 668 So. 2d 980 (Fla. 1996); State v. Makaila, 897 P.2d 967 (Haw. 1995); State v. Jones, 551 P.2d 801 (Kan. 1976); Gollott v. State, 646 So.2d 1297 (Miss. 1994); New Jersey State Parole Bd. v. Boulden, 384 A.2d 167 (N.J. Super. Ct. App. Div. 1978); State v. Salazar, 945 P.2d 996 (N.M. 1997); State v. McGettrick, 509 N.E.2d 378 (Ohio 1987); State v. McDonald, 424 N.W.2d 411 (Wis. 1988).

69. *See, e.g.*, *McGettrick*, 509 N.E.2d at 382-83.

70. *Makaila*, 897 P.2d at 967.

71. 554 P.2d 235 (Haw. 1976).

72. *Makaila*, 897 P.2d at 972.

73. *Id.*

74. *Id.* at 970 (citing *McGettrick*, 509 N.E.2d at 380).

75. *See* discussion *supra* notes 54-56 and accompanying text.

76. *Makaila*, 897 P.2d at 972. In support of the suggestion that, despite the heightened importance of the right to appeal cited by Cavallaro and others, loss of presumed innocence upon conviction is an equally well-established principal in the law, see *People v. Peters*, 537 N.W.2d 160, 162 (Mich. 1995).

defendant, that defendant's personal representative or the State may file a motion for substitution, and that absent such a motion, the appellate court "may, in its discretion, either (1) dismiss the appeal as moot, vacate the original judgment of conviction, and dismiss all related criminal proceedings, or, in the alternative, (2) enter such other order as the appellate court deems appropriate."[77] Procedurally, this is the manner in which most courts apply substitution.[78]

II. THE VICTIMS' RIGHTS MOVEMENT

A common criticism of the traditional American legal system is that it guarantees criminal defendants many constitutionally conferred rights[79] at the expense of the relatively-ignored victims of their crimes.[80] Although this

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77. 897 P.2d at 972. Following this ruling, which is consistent with other courts permitting substitution, clearly allows for the application of abatement ab initio if no party requests substitution. Query: Though an appellate determination is of primary importance to a living defendant trying to escape, justly or unjustly, punishment under his conviction, in many cases (i.e., those without a corresponding civil component that are more dependent upon a successful appeal), might those parties eligible to have standing in the place of the defendant be just as happy with the results of abatement? Why apply for substitution when doing nothing results in restoration of the defendant to presumed innocence without further time or expense on the part of any third party?

78. *See supra* note 68.

79. Jennie L. Caissie, Note, *Passing the Victims' Rights Amendment: A Nation's March Toward a More Perfect Union*, 24 NEW ENG. J. ON CRIM & CIV. CONFINEMENT 647 (1998). Caissie lists the constitutional rights guaranteed to criminal defendants:

> the right to counsel [Amend. IV], the right to due process of law [Amends. V, XIV], the right to a speedy trial [Amend. VI], the right to be free from double jeopardy [Amend. V], prohibition against self-incrimination [Amend. V], prohibition against unreasonable searches and seizures [Amend. IV], the right to have warrants issued only upon probable cause [Amend. IV], the right to a jury of peers [Amend. VI], the right to be informed of accusations [Amend. VI], the right to confront witnesses [Amend. VI], the right to subpoena witnesses [Amend. VI], prohibition against excessive bail [Amend. VIII], the right to a grand jury indictment [Amend. V], prohibition against excessive fines [Amend. VIII], and the prohibition against cruel and unusual punishment [Amend. VIII].

Id. at 654 (citations omitted).

80. *See* Gessner H. Harrison, *The Good, The Bad, and The Ugly: Arizona's Courts and the Crime Victims' Bill of Rights*, 34 ARIZ. ST. L. J. 531, 533-34 (2002) ("[T]hey were 'pushed aside, forgotten, ignored, [and] diminished by a [criminal justice] system too skewed in favor of the accused.'") (alterations in original) (quoting Editorial, *It Isn't All Bad*, PHOENIX GAZETTE, Nov. 13, 1990, at A12, *available at* 1990 WL 3736023); Koskela, *supra* note 15, at 158 ("There is little question that crime victims have deserved better than they have received from our system; even critics of the victim's [sic] rights movement acknowledge that victims often have been disregarded or treated as depersonalized 'evidence' by police, prosecutors, and judges."); Jay M. Zitter, Annotation, *Validity, Construction, and Application of State Constitutional or Statutory Victims' Bill of Rights*, 91 A.L.R. 5TH 343 § 2(a) (2001) ("[T]here is a widespread perception that the

defendant-centered approach is logical because the courts deal most directly with defendants, it has still become generally acknowledged that the system should not ignore crime victims.[81] Over the last thirty years, thirty-three states have adopted constitutional amendments incorporating victims' rights.[82] A proposed victims' rights amendment to our Federal Constitution has been before Congress five times, most recently in the 108th Congress.[83] Additionally, every state in the

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criminal justice system is out of balance since it coddles defendants . . . while [victims] are at best left out in the cold, or . . . are repeatedly insulted and hurt by the same system.").

81. *See* Caissie, *supra* note 79, at 684-85; Jennifer J. Stearman, *An Amendment to the Constitution of the United States to Protect the Rights of Crime Victims: Exploring the Effectiveness of State Efforts*, 30 U. BALT. L.F. 43 (1999). *But cf.* Ahmed A. White, *Victim's Rights, Rule of Law, and the Threat to Liberal Jurisprudence*, 87 KY. L.J. 357 (1999) (arguing that the idea of victims' rights actually serves to decay our justice system by claiming to balance scales—between defendants and victims—that cannot be balanced while maintaining meaningful safeguards so crucial for the just treatment of defendants).

82. National Victims' Rights Constitutional Amendment Network (NVCAN), http://www.nvcan.org//canmap.html [hereinafter NVCAN] (last visited Mar. 9, 2005) (The NVCAN is a formal organization led by members of various U.S. victims' advocate groups. While the organization works diligently at the state level to promote the enactment of VR legislation and state constitutional amendments, its ultimate goal is the adoption of a federal constitutional VR amendment.); *see also* Koskela, *supra* note 15, at 158 (discussing the history of the Victims' Rights Movement and its spread across the nation since the 1970s).

In reference to Geoghan's case specifically, Massachusetts does not yet have a constitutional victims' rights amendment. Notably, in 1988 (prior to either the Salvi or Geoghan cases) the state did adopt a statutory provision, the Rights of Crime Victims and Witnesses Act, providing many of the rights NVCAN supports. *See* MASS. GEN. LAWS ch. 258B §§ 1-13 (2003); NVCAN, *supra*.

83. *See* S.J. Res. 1, 108th Cong. (2003). A Victims' Rights Amendment has been proposed in each of the last five sessions of Congress. The text of the version before the 2003 Senate, proposed on January 7, 2003, reads:

> SECTION 1. The rights of victims of violent crime, being capable of protection without denying the constitutional rights of those accused of victimizing them, are hereby established and shall not be denied by any State or the United States and may be restricted only as provided in this article.
>
> SECTION 2. A victim of violent crime shall have the right to reasonable and timely notice of any public proceeding involving the crime and of any release or escape of the accused; the rights not to be excluded from such public proceeding and reasonably to be heard at public release, plea, sentencing, reprieve, and pardon proceedings; and the right to adjudicative decisions that duly consider the victim's safety, interest in avoiding unreasonable delay, and just and timely claims to restitution from the offender. These rights shall not be restricted except when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity.
>
> SECTION 3. Nothing in this article shall be construed to provide grounds for a new trial or to authorize any claim for damages. Only the victim or the victim's lawful representative may assert the rights established by this article, and no person accused

union provides some form of statutory guarantee of rights to crime victims, as does the federal government (though the quantity and quality of these rights varies by jurisdiction).[84] To understand the impact of abatement ab initio on victims of crime, it is helpful to become familiar with the policy underpinnings of the Victims' Rights Movement and the status of those policies in our legal system.

A. The Nature of the Rights Encompassed Under the Victims' Rights Rubric

The National Victims' Rights Constitutional Amendment Network (NVCAN) has identified ten "core rights" afforded to crime victims in a survey of state victims' rights amendments, statutes, and case law.[85] These rights include:

1. Protection and safety;
2. Information about services available to assist victims in several ways;
3. Information about crime victim compensation programs;
4. Notification of rights and the dates and times of proceedings;
5. To be present during criminal proceedings;
6. To be heard in criminal proceedings;
7. Prompt disposition of the case;
8. Information about the status and location of the offender;
9. Restitution;
10. Standing and enforcement, in order to make their complaints heard.[86]

Additionally, LaFave has categorized victims' rights amendment provisions as generally seeking any number of six objectives:

1. Making the victim whole economically;
2. Developing administrative sensitivity to the plight of the victim;

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of the crime may obtain any form of relief hereunder.

SECTION 4. Congress shall have power to enforce by appropriate legislation the provisions of this article. Nothing in this article shall affect the President's authority to grant reprieves or pardons.

SECTION 5. This article shall be inoperative unless it has been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within 7 years from the date of its submission to the States by the Congress. This article shall take effect on the 180th day after the date of its ratification.

Similar resolutions were proposed before the 108th Session in the House of Representatives. *See* H.J. Res. 10, 108th Cong. (2003) (proposed on January 7, 2003); H.J. Res. 48, 108th Cong. (2003) (proposed April 10, 2003).

84. *See* The National Center for Victims of Crime, Legislative Summary, *at* http://www.ncvc.org/ncv/main.aspx?dbName=DocumentViewer&DocumentID=38725 (last visited Mar. 7, 2005).

85. NVCAN, Victims' Rights Educational Project: Ten Core Rights, *at* http://www.nvcan.org/canm3s4.html (last visited Mar. 7, 2005).

86. *Id.*

3. Respecting the victim's privacy;
4. Providing protection against intimidation;
5. Reducing the burdens on victims willing to assist in prosecution;
6. Giving victims a participatory role beyond that of witness.[87]

Of course, any one of these six objectives may be achieved through one or more specific provisions in a given state's victims' rights legislation, and a given state (or the federal government) could ratify an amendment that includes provisions aimed at any number of these objectives.

Numerous rationalizations for the idea of victims' rights are espoused by its supporters. Among these are the societal responsibility to demonstrate support, compassion, and understanding for the victim who has suffered at the hands of a criminal; the benefit of including a victim in the prosecution of a defendant;[88] the need to sensitize criminal justice personnel (e.g., police officers, prosecutors, judges) to the problems faced by a victim;[89] and the need to address a victim's role in a crime, as opposed to simply using them to gather evidence and testimony related to the defendant's role.[90] While there are those who suggest that the Victims' Rights Movement is detrimental to the legal system,[91] the reality is that most states have passed victims' rights legislation supported by strong legislative and electoral majorities.[92]

B. The Status of the Victims' Rights Movement: Is It Strong Enough to Change the Way We Look at the Function of the Law?

The federal warming to victims' rights is indicative of the movement's standing as a political influence. Beyond the push for a federal constitutional amendment,[93] there have been other indications of support for victims' rights in the federal system. Victims' rights were first directly addressed by Congress under the Victims' Rights and Restitution Act of 1990 and the Crime Control Act

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87. WAYNE R. LAFAVE & JEROLD H. ISRAEL, 1 CRIMINAL PROCEDURE § 1.4(k) (2d. ed. 1992).

88. It stands to reason that a victim is the most interested party in seeing a defendant successfully and fairly prosecuted. Of course, this rationale can backfire sometimes—for example, a particularly zealous or vindictive victim may be unable to see the benefit in allowing a defendant to accept a plea bargain, instead hoping to see the defendant fully "get what he deserves." Also, certain classes of victims, particularly victims of violent crimes, may be either hesitant to participate in a prosecution or, conversely, may feel that their defendant deserves a more severe punishment than has actually been determined to be fair by our justice system.

89. "Victims' rights enactments may also sensitize criminal justice personnel . . . to the plight of the victim, give the victim some measure of dignity, and convey to the victim a message of administrative concern." Zitter, *supra* note 80, § 2(a).

90. *Id.*

91. *See* discussion *supra* note 20.

92. *See* Stearman, *supra* note 81, at app. A (table listing state-by-state electoral support for Victims' Rights Amendments passed through 1998).

93. *See* discussion *supra* note 83 and accompanying text.

of 1990.[94] A fairly comprehensive victims' rights statute, 42 U.S.C. § 10606 provided victims with the right to be treated with fairness and respect for their dignity and privacy; the right to reasonable protection from the accused; the right to be notified of court proceedings; the discretionary right to be present at court proceedings; the right to confer with the Government attorney in the case; the right to restitution; and the right to information about the conviction, sentencing, imprisonment, and release of the defendant.[95]

In its last session, Congress repealed the Victims' Bill of Rights with the enactment of an even stronger victims' rights statute as part of the Justice for All Act of 2004.[96] The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act (Crime Victims' Rights Act) guarantees each of the rights previously guaranteed to victims under § 10606.[97] It goes further than § 10606, however, by providing significant enforcement mechanisms aimed at protecting those rights, along with substantial funding available to the many sectors of the legal system that may deal with victims either directly or indirectly. The Act specifically addresses the duties of government officials with respect to victims' rights, calling for individuals and agencies to put forth their "best efforts" in according those rights that fall within their ability to protect.[98] The Act also sets forth a specific process for a victim, a victim's representative, or even a prosecuting attorney to follow in moving for relief and a writ of mandamus where a victim's rights are violated,[99] and requires the promulgation of regulations within one year of the Act's enactment aimed at enforcing victims' rights.[100]

Victims' rights advocates are also excited about the Act's provision of funding for various initiatives designed to make victims aware of their rights and to ensure the implementation and enforcement of the law.[101] Funding is available for victim/witness protection programs, technological enhancement of the methods employed for victim notification, the development, staffing and maintenance of free legal clinics for victims, and for training programs seeking to assist state-level jurisdictions in the implementation of and compliance with the statute.[102]

A comparison of the federal statutes to the core concepts of victims' rights

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94. 42 U.S.C. § 10606 (2000), *repealed by* Justice for All Act of 2004, Pub. L. No. 108-405, § 102(c), 118 Stat. 2260, 2264.

95. *Id.* § 10606(b).

96. Pub. L. No. 108-405, 118 Stat. 2260.

97. *Id.* § 102(a).

98. *Id.* § 102(b)-(c).

99. *Id.* § 102(c)(3).

100. *Id.* § 102(f).

101. *Id.* § 103; Press Release, National Victims' Constitutional Amendment Passage, Crime Victim Advocates Applaud Enactment of "Ground-Breaking" Federal Victim Rights Law (Nov. 1, 2004), *available at* http://www.nvcap.org/S2329/ Press%20Release.doc.

102. Crime Victims' Rights Act § 103. The total funding allocated by the Act for fiscal years 2005 through 2009 exceeds $150 million. *Id.*

amendments and legislation covered by NVCAN[103] and LaFave[104] indicates that legislators agree with the common principles driving the Victims' Rights Movement, even if they have not shown their full support of a constitutional amendment. Moreover, the United States Supreme Court has indicated an increased compassion for crime victims in its historic decision in *Payne v. Tennessee*.[105] In that case, the Court ruled that victim impact evidence, previously considered inadmissible under the Eighth Amendment's cruel and unusual punishment clause, was admissible at the sentencing phase of a criminal prosecution.[106] *Payne* acknowledges a policy in favor of making a sentencing authority aware of the harm a defendant's behavior has caused.[107] The *Payne* Court also addressed the interests inherent in providing a process by which a jury could balance the evidence presented in favor of the defendant (i.e., character evidence) with evidence relevant to blameworthiness and general considerations of culpability.[108] Victims' rights advocates argue that there is no better way to achieve this balance than by allowing a victim to assert the rights available under victims' rights legislation, particularly in regards to a victim's participation in trial and sentencing proceedings.

Although *Payne* focused on a victim's right to be heard in impact evidence, this case can be read in conjunction with the federal victims' rights statute to demonstrate a favorable view of the policies underlying the Victims' Rights Movement by the federal branch.[109] *Payne*'s narrow approach indicates an acceptance of the policy that a victim should be heard and that the victim's voice can provide valuable insight to the judge or jury attempting to determine the most appropriate sentence for a defendant. This acknowledges the policy that a victim is among those in the best position to provide a fair prosecution for a defendant. It further supports the proposition that criminal justice personnel should respect a victim's situation and the role that a victim can play, beyond an evidentiary one, in assisting the justice system. Additionally, the statutory Victims' Bill of Rights, taking a more holistic approach to overall victims' rights (as opposed to the narrow approach of *Payne*), expressly acknowledged the need for compassion and respect for a victim, and the replacement Justice for All Act of 2004 continues the holistic approach.[110]

Given the broad appeal and acceptance of the Victims' Rights Movement, it is valid to suggest that its policies have emerged as a considerable force in many areas of the law. The doctrine of abatement ab initio, then, seems ripe for an attack under these policies, as the doctrine directly conflicts with the rights these policies protect.

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103. *See* discussion *supra* notes 85-86.
104. *See* discussion *supra* note 87.
105. 501 U.S. 808 (1991).
106. *Id.* at 827; *see also* Zitter, *supra* note 80, § 2(a).
107. *Payne*, 501 U.S. at 827.
108. *Id.* at 825.
109. *See* discussion *supra* notes 88-92 and accompanying text.
110. *See* 42 U.S.C. § 10606(b)(1) (2000).

III. THE FRICTION BETWEEN ABATEMENT AND VICTIMS' RIGHTS

Though some courts have reasoned that the enactment of victims' rights amendments are irrelevant to the disposition of a case by application of the abatement doctrine,[111] it is fair to submit that the clearly harsh impact of abatement on a crime victim, coupled with the fact that a victim's only statutory recourse in such a case usually is found in victims' rights legislation, demands otherwise. This is supported by the decisions finding against the traditional application of abatement ab initio,[112] as well as by *Payne v. Tennessee*.[113] A contrast of the rights involved for defendants and victims within this conflict serves to clarify the point further.

Recall in Part I of this Note that advocates of the abatement doctrine cite various reasons for its application.[114] Many courts fail to state a specific policy justification for the rule, reasoning basically that a defendant, once dead, can no longer serve a sentence. A few courts provide a more developed analysis of the problem, such as, "all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender."[115]

However, as Part I made clear, more sophisticated, indeed, probably more accurate arguments for abatement center on the defendant's right to appellate review before a final disposition of his case,[116] and the importance of review as a mechanism for securing the accuracy of trial decisions.[117] Certainly, commentators and courts alike have come to suggest that this right borders upon implied constitutional protection.[118] Abatement ab initio, then, serves to preserve

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111. People v. Robinson, 699 N.E.2d 1086 (Ill. Ct. App. 1998) (Robinson I), *vacated by* 719 N.E.2d 662 (Ill. 1999) ("Robinson II"). In *Robinson I*, the Illinois appellate court disagreed with the circuit court's decision that the Illinois Victims' Rights Amendment (ILL. CONST. art. I, § 8.1(a)) was irrelevant. The appellate court dismissed the appeals and upheld the convictions of three men convicted of violent crimes, reasoning that the violent nature of the crimes afforded specific consideration to the rights of victims under the statute and precluded abatement of the convictions. *Robinson I*, 699 N.E.2d at 1089-91. The court also noted that allowing abatement of a violent crime "would have a senselessly harsh impact upon the psychological well being of [the victim's] surviving family [and it] would further have the effect of eroding confidence in the criminal justice system [among victims]." *Id.* at 1090. In *Robinson II*, the Illinois Supreme Court vacated the judgments, following the rationale of the district court and declaring that the VRA was irrelevant to the abatement debate. *Robinson II*, 719 N.E.2d at 663.

112. *See* discussion *supra* notes 60 and 68.

113. *See* discussion *supra* note 105 and accompanying text.

114. *See* discussion *supra* notes 50-56 and accompanying text.

115. Cavallaro, *supra* note 11, at 954 (quoting United States v. Dunne, 173 F. 254, 258 (9th Cir. 1909)).

116. *See* discussion *supra* notes 54 and 59 and accompanying text; *see also* Zitter, *supra* note 80, § 13(a).

117. *See* discussion *supra* notes 55-56.

118. *See* discussion *supra* note 59 (citing Professor Cavallaro's general opinion and the statement of Justice Stevens in *Pulley v. Harris* specifically regarding appellate review in capital

the appellate process where a defendant, through death, is no longer available to do so by employing the process for his own purposes.

Alternatively, as Part II of this Note examined, the idea of victims' rights serves a seemingly contrary function to that served by abatement ab initio: the protection of the victims of a crime. Whereas the criminal defendant is protected by various constitutional[119] and (arguably) impliedly-constitutional[120] rights, legislation under the Victims' Rights Movement seeks to protect the victims of a defendant's crime by guaranteeing them various rights as well.[121] In response to the often-recognized criticism that criminal defendants are protected to the detriment and complete disregard of victims, victims' rights legislation seeks to support victims by acknowledging their abuse at the hands of criminals, their role in the crimes committed against them and their interest and value in the prosecution of criminals.[122] This not only serves the individual interests of crime victims, but also societal policy interests promoting the prosecution of crime and favorable views of the criminal justice system.

It is not difficult, then, to identify the potential for conflict between these two sets of rights. Proponents of the abatement doctrine, at least as applied under the traditional majority rubric, advocate an absolute supremacy of defendants' rights over victims' rights, regardless of the contemptibility of the defendant's crime or the brutality of the result on the dignity and well-being of the victim. This reasoning applies even for defendants like John Geoghan and John Salvi III, for whom guilt is certain and uncontested, and whose victims are most certainly violated by the application of abatement ab initio and its ensuing restoration of each defendant's presumed innocence. Victims' rights advocates, on the other hand, argue that public policy and current political trends indicate that victims' rights have, for some time, been of increasing import in our judicial environment. To most victims, their rights merit as much or more consideration than those of the criminals who have violated them, particularly once the criminals are dead.[123] This reasoning carries greater weight when the guilt of a defendant is certain.

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cases); *see also* Sauder, *supra* note 12, at 359-62 (tracing the history of the right to appeal and its strength as a mainstay right of defendants).

119. *See* discussion *supra* note 79.

120. *See* discussion *supra* notes 59, 118.

121. *See* discussion *supra* notes 85-87 and accompanying text.

122. *See* discussion *supra* notes 88-90 and accompanying text.

123. This comment evokes Sauder's thesis that abatement ab initio should be applied following the death of a defendant, provided that the defendant did not commit suicide. Sauder, *supra* note 12, at 367. Sauder discusses the application of the doctrine following the suicide of John Salvi III, arguing that a criminal can exact a measure of revenge (whether intentionally or not) on his victims and the criminal justice system in general via suicide. *Id.* at 373-74. This Note does not advocate this position, finding it to be patently offensive in its disregard for the illness suffered by a vast majority of suicidal individuals; however, aside from his analysis of suicide, Sauder lends support to the notion that most defendants, once expired, would be hard-pressed to argue that their rights should subjugate those of their victims.

What defendants' rights advocates fail to recognize, however, is that the interests of defendants and victims are not necessarily mutually exclusive in the appellate context; a victim is equally as well-served by a final determination of guilt at the appellate level as is a defendant. Application of the abatement doctrine, unfortunately, disregards this logic and throws the two sets of rights out of balance. This serves no party well: neither defendants, nor victims, nor society. In analyzing abatement issues, it is important for any court to keep in mind the defendant's and public's interests in having a case conclusively adjudicated. It is equally important, however, to balance those interests with the victim's and public's interests in disposing of cases in a manner consistent with the rights of victims under victims' rights legislation. What the criminal justice system needs, then, is a tool that can restore the proper balance of these two interests, preserving the rights guaranteed to all involved parties. Our system already has such a tool: the moderation approach to the abatement quandary.

IV. BALANCING THE RIGHTS OF DEFENDANTS AND VICTIMS—CHOOSING THE MODERATION APPROACH

The moderation approach discussed in Part I allows for the continuation of appellate proceedings even after the death of a defendant by providing for the substitution of a party in standing for the defendant. This Part explores the usefulness of this approach as a mechanism that successfully balances the interests of defendants and victims and their corresponding public policy interests. First, however, it is useful to demonstrate why the other two approaches to abatement ab initio are ineffective in achieving this desirable balance.

A. The Failure of Justice Under the Polar Approaches to the Abatement Doctrine: Appellate All or Nothing is Unfair to Everyone

The majority approach[124] is unsuccessful because it altogether fails to address the interests of the victim. It cannot reasonably be said that the victims of a crime, particularly of violent or heinous crimes such as those in the Geoghan case, do not suffer harm or offense to their psychological well-being when their perpetrator is cleared of all charges upon his death. Further, it is an insufficient outcome in our legal system when it is considered that most of these appeals would be decided against the defendant if they actually were to be fully adjudicated.[125] The majority opinion, then, essentially trades a likely finalized conviction and the well-being of crime victims for a very unlikely result that is offensive both to crime victims and the public at-large, all in the name of protecting the interests of a person no longer able to enjoy such protection, who

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124. *See* discussion *supra* notes 21-49 and accompanying text.

125. *See* discussion *supra* note 62. Although this discussion points out that the appellate process, in overturning a significant percentage of trial court decisions, may serve to erode the public's confidence in the court system, it is nonetheless clear that a significant majority of appeals result in final judgments upholding the decisions of lower courts.

would never likely have received such a favorable outcome in the first place.

The primary minority approach,[126] dismissal of the appeal upon the death of a defendant, is in many ways equally offensive. Obviously, it fails to protect any remaining interests the defendant or his survivors may have in appellate review by confirming finally the defendant's guilt without his ever having had access to the process by which our legal system attempts to ensure that such a verdict is indeed just. This approach is equally unfair to the victim of a crime and to society, stripping all of the various measures of security that final adjudication brings: proof that the system is effective; that the right defendant has been prosecuted and vindication has been achieved (inasmuch as the legal system can provide); that the case, along with the legal plight of the victim, is finally and fully closed.

B. The Balance Inherent in the Moderation Approach

Whereas both of these approaches are historically inadequate and demonstrably unfair in the current legal environment in support of victims' rights, the moderation approach[127] is able to remedy the shortcomings of both positions. Defendant substitution is the only approach to this issue that truly attempts to reconcile the seemingly at-odds rights of defendants and victims under the abatement doctrine while keeping in mind the ultimate societal interests in the debate.[128]

By allowing a substitute defendant, the rights of the defendant and his survivors are protected by encouraging full and final adjudication of a case. A defendant's family or his personal representative is provided with the opportunity to receive all the protections our courts afford via the appellate system. At the same time, a victim's rights are as fully acknowledged and protected as they are in an ordinary case with a living defendant. Victims retain the assurance that the convicted person is subject to all levels of the review process. Abatement will not serve to destroy their faith in the credibility of the legal system, or to promote a sense that the legal system is entirely defendant-centered without regard for the well-being of victims. Perhaps most importantly, in a general sense, the public interests involved are satisfied by the fact that the case is presumably resolved in the same manner and reached the same final result as would have been the case had the defendant lived to exercise his right to appeal.

Regarding any procedural concerns, the approach will be no more difficult

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126. *See* discussion *supra* notes 60-67 and accompanying text.

127. *See* discussion *supra* notes 68-78 and accompanying text.

128. *See* State v. Makaila, 897 P.2d 967, 972 (Haw. 1995):

> [W]e recognize the importance of the interests advanced by both parties in the matter before us .... [Defendant's] family seeks "vindication" of the deceased. The State has an interest in preserving the presumptively valid judgment of the trial court. A resolution of the matter of going forward with the appeal ... involves a policy decision that rests solely within the discretion of this court .... [Allowing for substitution of the defendant] fashions a fair compromise between the competing interests.

for courts to enforce than the ordinary appellate process.[129] The only procedural differences in applying the approach involve the uncomplicated process of requesting and granting substitution of a party in standing for the defendant, and the determination by the State to dismiss the proceedings if no party requests substitution. Additionally, since the moderation approach protects the rights of all parties and the public interest fully to the same extent as the appellate process, legislatures would no longer need to be concerned with analyzing the abatement doctrine and its attendant policy concerns, as has been the case in Massachusetts for several years.[130]

CONCLUSION

Returning to a discussion of the John Geoghan case, the above analysis can apply to the three positions on abatement ab initio as a means of illustrating the strength of the moderation approach. The Geoghan case is a well-suited mechanism for such illustration because of the high profile of the Boston Church scandal and the compassion and understanding evoked by the child victims. Any tolerance for the idea of victims' rights is certainly enhanced by the facts of this tragic case.

Under the majority position (the position, unfortunately, followed in the state of Massachusetts), abatement ab initio has served to restore John Geoghan to a status of presumed innocence. It does not matter that he was clearly guilty of hundreds, perhaps thousands, of instances of sexual predation of children. It does not matter that he is regarded by many as the most vilified character connected to a scandal that calls into question the motives and actions of many priests in the Catholic Church.[131] It does not matter that the dignity and peace of mind offered to his victims by his conviction has been violated. John Geoghan's conviction does not stand. It is difficult to accept an argument that this does not offend the rationale behind the appellate review process.[132] More fittingly, this result

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129. *See* discussion *supra* note 77 and accompanying text (covering the procedural employment of the moderation approach used by most courts following the position).

130. *See* Bostrom et al., *supra* note 16, at 172 n.106 (discussing the difficulties in addressing this issue before the Massachusetts State Legislature); *see also* discussion *supra* note 19 (discussing failed Massachusetts legislation).

131. *See* THE JOHN JAY COLLEGE OF CRIMINAL JUSTICE OF THE CITY UNIVERSITY OF NEW YORK, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, THE NATURE AND SCOPE OF THE PROBLEM OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS AND DEACONS IN THE UNITED STATES (Apr. 16, 2004), *available at* http://www.usccb.org/nrb/johnjaystudy/. This study, covering eighty percent of the Catholic priests in the United States, found that approximately four percent of priests (numbering over 4000) had been accused of at least one instance of sexual abuse of a minor child between 1950 and 2002. *Id.* at 5-6. As to the scope of abuse, the study found that "the problem was indeed widespread and affected more than 95% of dioceses and approximately 60% of religious communities." *Id.* at 39, *available at* http://www.usccb.org/nrb/johnjaystudy/prev2.pdf.

132. For Professor Cavallaro's view of abatement and the right to appeal in the Geoghan case (consistent with her view as cited throughout this note), see Rosanna Cavallaro, Opinion, *Why,*

offends the very rationale of justice underlying the process of criminal adjudication itself.

The primary minority approach, abolition of the abatement doctrine, is equally inadequate, as demonstrated by the Geoghan case. While Geoghan's guilt was clear and well documented by the Boston Catholic Church itself,[133] the fact that Geoghan was a participant in the appellate process indicates that he recognized the possible advantages of exercising his right to appeal. John Geoghan had the same right as every other defendant to have his appeal heard and to have the proceedings of the trial court reviewed for error that might have changed the outcome of his case. At the time of his death, John Geoghan was the subject of at least eighty-four civil lawsuits.[134] A favorable ruling for Geoghan at the appellate level could have had significant positive implications for John Geoghan, even if he had remained imprisoned. The importance of the right to appeal cannot be denied in this case.

The moderation approach, however, is available to courts facing the dilemma proposed by these other two positions. Under the moderation approach, John Geoghan's death would not result in disregard for the rights of Geoghan or his victims. Rather, society would see the strong policy interests underlying the right to appeal protected from the arbitrary decision of fate. A representative for Geoghan—a family member, his lawyer, perhaps even the Catholic Church in a display of good faith—would be permitted to stand in for John Geoghan and to see his case through the appellate process. Geoghan would not be present; he would not realize the final determination of his case. However, the case would move forward to the same fruition as could otherwise be realized only if Geoghan had lived. There would be no call for legislative action to protect the rights of Geoghan's victims or the integrity of a sound trial court conviction. There would be no violation of the closure those victims had within their grasp until the moment Geoghan was murdered. Indeed, the right to appeal would be protected and employed with precisely the effect intended. The moderation approach would address all of these concerns, while reinforcing and re-dignifying our criminal court system and allowing the system to serve justice upon a child molester.

The doctrine of abatement ab initio provides a perfect illustration of the conflict between defendants' and victims' rights in the American legal system. This Note discussed various constitutional, pseudo-constitutional, statutory and common law developments that compete in our courts every day in an attempt to balance these rights and secure a fair adjudication for defendants and a just resolution for victims. The policies underlying each of these two interests, standing in stark contrast when abatement is permitted, can be reconciled only

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Legally, Geoghan Is Now "Innocent," BOSTON GLOBE, Aug. 29, 2003, *available at* http://www.boston.com/globe/spotlight/abuse/stories5/082903_cavallaro.htm.

133. *See* Michael Rezendes, *Church Allowed Abuse by Priest for Years*, BOSTON GLOBE, Jan. 6, 2002, *available at* http://www.boston.com/globe/spotlight/abuse/stories/010602_geoghan.htm.

134. *See* discussion *supra* notes 5-6 and accompanying text.

when justice is allowed to carry a case forward without regard to the death of one of the parties. Where abatement, or alternatively, the approach abolishing abatement altogether fails, the moderation approach succeeds. Moderation protects the rights of defendants inherently contained in the appeals process, but also protects the rights of crime victims recognized by every state and so resoundingly last year by our federal government. Because the moderation approach is able to bring a sense of equilibrium to the conflict created by abatement ab initio, it is the approach best adopted by jurisdictions left to manage the case of a deceased defendant.

ANCIENT LIGHTS IN WRIGLEYVILLE: AN ARGUMENT FOR THE UNOBSTRUCTED VIEW OF A NATIONAL PASTIME

STEPHEN CHRISTOPHER UNGER*

I. THE LINEUP: INTRODUCTION

> "In our built environment, the value in the view is more than an individual aesthetic one. There are structures which we, individually and culturally, have come to regard as significant. The destruction or defacement of these structures dislocates and dispirits us."[1]

Property views are not generally considered a right incident to land in the United States, and unless acquired pursuant to an express grant or covenant, they generally are not protected in a court of law.[2] Even at common law, where easements were often recognized in light and air, easement rights in a view were rejected as purely aesthetic in nature. A view was traditionally considered "a matter only of delight and not of necessity," to which "no action lies for the stopping thereof."[3] Today, however, views have taken on more significance than once recognized. They frequently represent valuable property interests, for which landowners and tenants pay more to acquire.[4] They also often extend to serve the interests of well more than the individual estate to provide for the needs of entire communities. While both traditional and current jurisprudential thinking would indicate that the law closes the door on any common law rights to a view, courts in the United States have yet to balance the weight of a communal and even national interest in a view within the context of the common law. One lawsuit in northern Chicago concerns a view to a national pastime, and presents a ripe setting to critique the historically universal rejection of any right to a view.

On December 17, 2002, the Chicago Cubs baseball organization filed a lawsuit against the owners of nine clubs whose patrons watch the team's baseball games from rooftops across the street from Wrigley Field ballpark. The complaint alleged that the rooftop operators violate copyright laws and directly compete with the Cubs for ticket sales. Cubs' president and CEO Andy MacPhail explained that "[t]he rooftop owners take in as much as $10 million a year by selling seats to view our games. We do not believe the rooftop operators are entitled to profit from our names, our players, trademarks, copyrighted

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1. John Nivala, *Saving the Spirit of Our Places: A View on Our Built Environment*, 15 UCLA J. ENVTL. L. & POL'Y 1, 18 (1996-97).

2. Tara J. Foster, Comment, *Securing a Right to View: Broadening the Scope of Negative Easements*, 6 PACE ENVTL. L. REV. 269, 270 (1988).

3. R.G. NICHOLSON COMBE, LAW OF LIGHT 12 (1911) (citing *Aldred's Case*, 9 Co. Rep. 58b (1610)).

4. Foster, *supra* note 2, at 269.

telecasts and our images without our consent."[5] In response, the rooftop owners claimed that "the Cubs sat by and raised no objections while the owners spent millions to upgrade their facilities and obtain licenses to operate. The owners further characterized their rooftops as contribut[ing] to the unique character of baseball at the ballpark."[6]

The lawsuit arose out of the Cubs' frustration with nearby residents who had opposed plans to expand the ballpark. The complaint was filed three days after the City of Chicago put in motion a plan to grant Wrigley Field historic landmark status, a designation that would guard against any alterations that could detract from the historical significance of the eighty-nine-year-old ballpark.[7] The Cubs organization had been working to win approval for plans to expand the park before the landmark proceeding began, but the organization was unable to negotiate a deal with their neighbors, who were concerned about the potential for increased parking, traffic, litter, noise, crime, and other nuisance problems. The rooftop owners, fearing that their views of the Cubs' diamond would be blocked by a plan to expand the outfield bleacher seating, supported the neighbors in the negotiations.[8]

In January 2004, the Cubs organization and the rooftop owners, with the exception of three holdouts, reached a formal agreement settling the dispute.[9] The twenty-year agreement required the rooftop owners to pay the Cubs seventeen percent of their gross revenue.[10] Cubs' estimates place about 1700 fans on the rooftops for each game, and the organization's cut of about fifteen to twenty-five dollars for each ticket would net the team approximately $2 million per year.[11] As part of the deal, the Cubs are required to compensate the rooftop owners if their views are obstructed from any ballpark expansions over the next eight years.[12] The agreement, coincidentally, coincides with a decision of the Chicago city council to unanimously recommend landmark status for certain features of Wrigley Field.[13] The plan grants landmark status to Wrigley Fields' exterior, scoreboard, grandstands and bleachers, and also the brick wall and ivy

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5. Ronald Roenigk, *Cubs, Bar Owners Back to Battling in Courts as Landmark Status Moves Forward, Inside*, *at* http://www.insideonline.com/site/epage/8393_162.htm (Dec. 18-24, 2002).

6. Casey Bukro, *Rooftops Called Wrigley Charm*, CHI. TRIB., Jan. 8, 2003, at 3.

7. Alexia Elejalde-Ruiz, *Take Me out to the Historic Landmark*, BOSTON GLOBE, Jan. 19, 2003, at A.14.

8. *Id.*

9. Gary Washburn, *Rooftop Owners and Cubs OK Deal*, CHI. TRIB., Jan. 30, 2004, at 1.

10. H. Gregory Meyer, *Cubs, Rooftop Owners Cut Deal*, CHI. TRIB., Jan. 12, 2004, at 1.

11. Shamus Toomey & Fran Spielman, *Rooftop Owners Agree to Pay Cubs*, CHI. SUN-TIMES, Jan. 11, 2004, at 3.

12. Meyer, *supra* note 10.

13. Carrie Muskat, *Council Approves Landmark Status*, MLB.com, Jan. 27, 2004, *at* http://chicago.cubs.mlb.com/NASApp/mlb/chc/news/chc_news.jsp?ymd=20040127&content_id=631178&vkey=news_chc&fext=.jsp.

surrounding the playing field.[14] Notably, the city's plan allows the team to make necessary changes to the park for it to remain economically viable. The designation does not preclude expansion of the bleachers, which would obstruct the current rooftop views, but does not provide for expansion either.[15]

While the parties have seemingly resolved their differences, the notion lingers that absent an agreement otherwise, the Cubs organization has a legal right to obstruct the rooftop views. Though the future facts and parties may change, the potential remains for unrestricted rights to block a landowners view, regardless of how publicly important that view may be. This Note uses the situation of the Wrigleyville dispute as a vehicle to advocate a change in the common law's rejection of all legal rights to a view.[16] The Note first establishes the underlying considerations used to deny landowners actionable rights to a view. This analysis necessarily includes an assessment of the historic rejection of a landowner's right to a view in both England and the United States, and the relationship among the development of light, air, and view law. The Note then addresses the cases and commentary attacking the validity of such reasoning in many of today's contexts, as in the circumstances of solar panel rights, from which a more contemporary public policy standard might be derived. The Note opines that public policy has in fact always been the basis for rejecting or accepting property rights to light, air, and view. The Note then applies that standard to a view interest supported by a strong public policy, as in the preservation of history and its aesthetic value. Finally, the Note concludes that the historical value behind the rooftop views should create an actionable right to an unobstructed view of Wrigley Field.

II. COOPERSTOWN: ORIGINS OF LIGHT, AIR & VIEW LAW

> "[I]f a man builds a house and stops the *light* coming to my house . . . I shall have the *Assize* it."[17]

A. The House That Aldred *Built: Ancient Lights and the English Common Law*

As with most of the common law in the United States, the American concept

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14. *Id.*

15. *Id.*; *see also* Roenigk, *supra* note 5.

16. While the principle lawsuit sounds in copyright violations, intellectual property law is not within the scope of this Note. Rather, the underlying concern of the parties is whether the Cubs organization may obstruct the rooftop owners' view of the playing field. For authority concerning the copyrighting of sporting events, which further supports the contention that the underlying concern of parties is the obstruction of a view, see *Philadelphia Eagles Football Club, Inc. v. City of Philadelphia*, 823 A.2d 108, 122 n.19 (Pa. 2003) (noting the "well-established rule that the actual performance of a professional sports game is not protected by copyright").

17. Dale D. Goble, Comment, *Solar Rights: Guaranteeing a Place in the Sun*, 57 OR. L. REV. 94, 108 n.54 (1977) (citing Y.B. Mich. 22 Hen. 6, f. 14, pl. 23 (1444)).

of light, air, and view property rights evolved from English common law doctrine, and was only later tailored to fit contemporary needs and interests. Courts in the United States tended to follow the English common law until public policy demands pushed courts to openly reject the ancient standard, though they in fact remained parallel with the common law in respect to view rights, and arguably only reapplied the common law's approach to light and air rights. Today, light, air, and view rights have been notoriously meshed to lead many to believe that they are inseparably connected. Historically, however, rights to light, air, and view were somewhat distinct,[18] and were constructed to serve the slowly developing, and often rural, public needs of the time.

1. Early Light and Air Law.—Under the earliest common law, access to light and air was distinguished from easements as natural rights.[19] Natural rights differed from easements in that they came into existence through land possession alone, while easements could only be created specifically through a grant, regardless of their affirmative or negative character.[20] Originally, a party seeking to establish the natural right to light or air was required to show that he or she had enjoyed the use "from time whereof the memory of man runneth not to the contrary."[21] By the end of the sixteenth century, however, English courts classified light and air as negative easements. Nevertheless, in many cases, even without the necessary easement grant, the right would generally be implied from circumstances where an alleged easement had been enjoyed for a long period of time. "This relaxation was developed in order to give legal validity to what has, by long user, become accepted as a fact."[22] Especially in smaller and tighter communities, most of the population could identify, often for generations, the benefits that certain parcels and their estates enjoyed. Essentially, the courts developed a more workable standard that fostered concrete legal concepts while at the same time permitting more flexibility than had been offered through the notion of natural rights. Thus, from the concept that an easement right might be acquired where traditionally recognized by the community arose the judicially created doctrine of ancient lights.[23]

Under the doctrine of ancient lights, "the owner of a house with ancient windows has a right to prevent any owner of adjoining land from doing anything upon his soil which may obstruct the access of light and air to the ancient

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18. COMBE, *supra* note 3, at 14. One early court explained that "[l]ight and air are bestowed by Providence for the common benefit of men." Embrey v. Owen, 6 Ex. 353, *quoted in* HUMPHRY W. WOOLRYCH, A PRACTICAL TREATISE OF THE LAW OF ANCIENT AND MODERN WINDOW LIGHTS 1 (1864).

19. A great deal of confusion about what constituted a natural right or an easement at the common law ensued from the English courts' lack of clarity in distinguishing between the two. The fact that "assize of nuisance" served as the remedy for infringement of both augmented the confusion. Foster, *supra* note 2, at 276.

20. *Id.* at 275.

21. Clawson v. Primrose, 4 Del. Ch. 643, 655 (1873).

22. PATRICK J. DALTON, LAND LAW 189 (1972).

23. Foster, *supra* note 2, at 276.

window."[24] In its earliest form, the doctrine permitted an owner of two adjacent lands to convey one parcel and retain an unobstructed flow of light and air to his remaining property, assuming he had previously enjoyed such a benefit for the prescriptive period, usually twenty years.[25] The doctrine evolved to allow the landowner to acquire an easement of light and air across the property of an adjoining landowner when such access had been enjoyed for the prescriptive period, regardless of whether the landowner had himself conveyed the servient parcel. The dominant owner could thereby prevent the erection of any structure on the servient estate that would unreasonably block the flow of light and air.[26]

The proposition that the doctrine's nature arose from public need is evident in the scope some courts used to limit its extent. "Behind those [ancient] windows there might be a small or a large room, so that a smaller or a larger amount of light might be acquired; or the room might be used for ordinary purposes requiring only an ordinary amount of light, or for extraordinary purposes requiring an extraordinary amount."[27] At a time when the light bulb and central heating were inconceivable, natural light from the sun was a necessary source of both warmth and lighting. Courts of the era recognized this need and generally limited the scope of the nuisance remedy "unless so much light was taken that the house was rendered uncomfortable."[28] The same may be said for the pollution of air.[29] The utility nature of the doctrine is also evident in the elimination of the easement through non-use.[30] There was no longer a public interest in preserving a right that was not used, especially where the interests once subordinated could prove to be beneficial.

2. A View Historically Distinguished.—While English courts recognized common law rights in light and air under the ancient lights doctrine, view rights were rejected well before American jurisdictions considered the issue. As one early jurist observed, "[o]bstructing a beautiful prospect which I have always enjoyed from the windows of my house is, in the view of English law, a mere *damnum*; diminishing by obstruction the quantity of light and air which I receive through ancient windows is injuria."[31] Although the earliest English courts made little mention of the right to a view, it appears that a view may have also

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24. KENELM EDWARD DIGBY, AN INTRODUCTION TO THE HISTORY OF THE LAW OF REAL PROPERTY 127 (5th ed. 1897).

25. Foster, *supra* note 2, at 276.

26. S. MAURICE, GALE ON EASEMENTS 260-79 (15th ed. 1986); R. MEGARRY & H.W.R. WADE, THE LAW OF REAL PROPERTY 903-06 (5th ed. 1984).

27. 7 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 340 (2d ed. 1937).

28. *Id.*; *see also* WOOLRYCH, *supra* note 18, at 2 ("[Lights] worth lies in utility, as opposed to luxury.").

29. HOLDSWORTH, *supra* note 27, at 341.

30. WOOLRYCH, *supra* note 18, at 106.

31. DIGBY, *supra* note 24, at 88 n.1.

constituted a natural right until the time of *Aldred's Case*,[32] in 1611.[33]

Aldred's Case was an action brought by William Aldred against Thomas Benton for erecting "a pig-sty so near [Aldred's] house that the air thereof was corrupted."[34] In determining the extent of Aldred's injury in order to assess the appropriate remedy, the court drew a clear line between the right to a view, or prospect, and the right to light and air. An action would lie by the owner of property for interference with his right to air or light, but no action would be recognized for the obstructing of a prospect, "which is a matter only of delight and not of necessity" even though "it is a great commendation of a house if it has a long and large prospect.... But the law does not give an action for such things of delight."[35] The court seemed to distinguish light and air from a view on the ground that light was a right for which "the ancient form of an action on the case was significant."[36] The court noted that a nuisance would also lay for an interruption "[t]o the habitation of a man, for that is the principal end of a house."[37] In the case of air, as here, if a neighbor burns a substance or produces a smell that overtakes the plaintiff's home "so that none can dwell there, an action lies for it."[38] The distinction is that there is no natural need for a view, and the blocking of a view does not render a house uninhabitable. Homes without adequate light or ventilation in the early seventeenth century, as previously discussed, would cause a substantial injury to the owners. The law here seemed to therefore serve the practical and necessary purpose of protecting habitability.

Traditionally, English courts have not only rejected view rights as matters of delight, but also because of the potential burden they create on surrounding estates. Lord Blackburn in *Dalton v. Angus* balanced the public policy of the community in noting that

> on the balance of convenience and inconvenience, it was held expedient that the right to light, which could only impose a burthen upon land very near the house, should be protected when it had been long enjoyed, on the same ground it was held expedient that the right of prospect, which would impose a burthen on a very large and indefinite area, should not be allowed to be created, except by actual agreement.[39]

Such a burden tended to arise from the inability to precisely determine the scope

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32. 9 Co. Rep. 57 b, 77 Eng. Rep. (K.B. 1611) 816, *reprinted in* All E.R. Reprint 1558-1774, at 622 (1968).

33. Foster, *supra* note 2, at 276-77.

34. Aldred's Case, 9 Co. Rep. 57 b, 77 E.R. 816, *reprinted in* All E.R. Reprint 1558-1774, at 623 (1968).

35. *Id.* at 623-24. Ironically, the court cites *Ecclesiastes* 11:7, which states "[l]ight is sweet, and it pleases the eyes to see the sun," somewhat acknowledging that it is also a matter of delight.

36. *Id.* at 623.

37. *Id.*

38. *Id.* at 624.

39. Dalton v. Angus, 6 App. Cas. 740, 824 (1881).

of the view. The need for light, on the other hand, could be more definitely measured depending on the size of the room "behind those windows" and the amount of light necessary to keep it comfortable.

The notion, though often unfounded, that all easements had their origin in words also led to the requirement that the subject matter of easements must be reasonably definite.[40] The same held true regardless of the form of the easement at issue. In *Bryant v. Lefever*,[41] it was held that the flow of air in undefined channels could not be the subject-matter of an easement. On the other hand, the right to a flow of air to a window in its natural state was a well-established easement.[42] The common factor of the scope cases "seems to be that when an easement is being acquired by long user the servient owner should be able to discern easily what rights are being secured against him so that he will be able to resist and nullify them before they become established as legal rights."[43] The channel of a view, however, was difficultly defined, and might easily have extended as far as the eye could fathom. The English common law's practice towards rights of light, air, and view therefore made sense as more than mere tradition or custom. Rather, it served the practical needs of ensuring continued habitability while at the same time protecting surrounding landowners from burdensome restrictions on development. Minor burdens remained tolerable until the need arose for unbridled development in the booming growth of the United States.

B. The Mighty Fontainebleau *Comes to Bat: American Courts and Booming Development*

While the American bar originally tended to adhere to the common law, the turn of the eighteenth century brought the decline of the doctrine of ancient lights in the United States. Most American courts today deny all easement rights to light or air by implication, except in limited cases of necessity.[44] The New York Superior Court was one of the first American courts to reject the ancient lights doctrine, though not the focus of the dispute, in *Parker v. Foote*.[45] In dicta, the court criticized the doctrine's applicability to the American vision of rapid growth. Justice Bronson declared for the court:

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40. DALTON, *supra* note 22, at 189.

41. 4 C.P.D. 172 (1879).

42. Wong v. Beaumont Property Trust Ltd., 1 Q.B. 173, 180 (1964).

43. DALTON, *supra* note 22, at 190.

44. Foster, *supra* note 2, at 278. One may, of course, still obtain an express easement for light and air. *See* Annotation, Express Easements of Light, Air, and View, 142 A.L.R. 467 (1943); U.S. v. 0.08246 Acres of Land, 888 F. Supp. 693, 710 n.22 (E.D. Pa. 1995) (observing that express easements for light, air, and view may be destroyed if character of neighborhood changes); Lawrence v. 5 Harrison Assocs., 742 N.Y.S.2d 826, 826-27 (App. Div. 2002) (construing express easement for light and air). Also, under Louisiana common law, servitudes of light and view may be established by prescription. *See* Palomeque v. Prudhomme, 664 So. 2d 88, 91 (La. 1995).

45. 19 Wend. 309 (N.Y. Sup. Ct. 1838).

> There is, I think, no principle upon which the modern English doctrine on the subject of lights can be supported. It is an anomaly in the law. It may do well enough in England . . . . [b]ut it cannot be applied in the growing cities and villages of this country, without working the most mischievous consequences. It has never, I think, been deemed a part of our law.[46]

Two considerations have generally substantiated this attitude. First, easements for light, air, and view are negative,[47] a characteristic that is strongly disfavored. The concept of adverse use requires actionable conduct by the claimant that interferes with the enjoyment of the servient estate's use. The argument suggests that the access of light and air across another's property, as well as the enjoyment of a view, does not intrude upon the use of the servient tenement, and therefore cannot serve as the basis for establishing a prescriptive easement.[48] This consideration somewhat parallels the English concern for identifying a view easement, as it is difficult to find an intrusion by an indefinable servitude. Second, as in *Parker*, American courts have long expressed concern that recognition of prescriptive rights to light, air, and view would retard development of vacant land. As one court remarked, the doctrine of ancient lights is "not suitable to the conditions of a new, growing and populous country, which contains many large cities and towns, where buildings are often necessarily erected on small lots."[49]

Probably the most recognized authority representing the American rejection of ancient lights is the Florida case of *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*,[50] an action between two luxury hotels facing the Atlantic Ocean. A proposed addition to the Fontainebleau Hotel shadowed the cabana, swimming pool, and sunbathing areas of the Eden Roc Hotel. Such a shadow, according to the Eden Roc, rendered their beach access wholly unfitted for the use and enjoyment if its guests. The Eden Roc further alleged that the construction would interfere with the easement of light and air enjoyed by them and their predecessors in title for more than twenty years.[51] The *Fontainebleau* court reasoned that the maxim *sic utere tuo ut alienum non laedas* "means only that one must use his property so as not to injure the lawful *rights* of another."[52]

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46. *Id.* at 317.

47. *See* Rahabi v. Morrison, 440 N.Y.S.2d 941, 946 (App. Div. 1981) (classifying easement to protect dominant owner's light and air as negative because it restricts actions of servient owner).

48. *See* Tenn v. 889 Assocs., 500 A.2d 366, 369 (N.H. 1985) (holding that enjoyment of light is not characteristic adverse use); *Parker*, 19 Wend. at 317 ("But in the case of lights there is no adverse user nor indeed, any use whatever of another's property. . . .").

49. Lynch v. Hill, 6 A.2d 614, 618 (Del. Ch. 1939); *see also* Turner v. Thompson, 58 Ga. 268, 271 (1877) (explaining that doctrine of ancient lights "does not suit a young and growing country, such as ours is").

50. 114 So. 2d 357 (Fla. Dist. Ct. App. 1959).

51. *Id.* at 358.

52. *Id.* at 359.

The court continued that a property owner may put his property to any lawful use, "so long as he does not thereby deprive the adjoining landowner of any right of enjoyment of his property *which is recognized and protected by law, and so long as his use is not such a one as the law will pronounce a nuisance.*"[53] Placing this emphasis on a requisite need for the infringement of a legally recognized right, the court quickly concluded:

> There being, then, no legal right to the free flow of light and air from the adjoining land, it is universally held that where a structure serves a useful and beneficial purpose, it does not give rise to a cause of action, either for damages or for an injunction under the maxim *sic utere tuo ut alienum non laedas*, even though it causes injury to another by cutting off the light and air and interfering with the view that would otherwise be available over adjoining land in its natural state, regardless of the fact that the structure may have been erected partly for spite.[54]

The court felt that where no such "useful and beneficial purpose" is served, and public policy demands otherwise, restrictions should come instead through amending the comprehensive planning and zoning ordinance. "[T]o change the universal rule . . . amounts, in our opinion, to judicial legislation."[55]

While American courts rejected the common law's approach to light and air easements, they have generally mirrored the historic refusal to recognize a right to a view. For example, in *Pierce v. Northeast Lake Washington Sewer and Water District*,[56] the Washington Supreme Court rejected a claim for the obstruction of a view of Mount Rainier and the Cascades by a water storage tank, holding that mere infringement upon the personal pleasure and enjoyment of property is not a sufficient basis for compensation.[57] Yet American reasoning was not an exact replica of the English common law. Rather, American courts placed easement rights to a view on the same level as those of light and air. This is reflected by "modern American commentators' practice of lumping easement rights to light, air, and view together and in American courts' identical treatment of these rights as negative easements."[58]

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53. *Id.* (quoting Reaver v. Martin Theatres, 52 So. 2d 682, 683 (Fla. 1951)) (emphasis in original).

54. *Id.*

55. *Id.* at 360.

56. 870 P.2d 305 (Wash. 1994) (en banc).

57. *Id.* at 313.

58. Foster, *supra* note 2, at 278-79 ("[T]he current general rule in this country states that a right to view, like a right to light or air, can only arise by express grant or covenant or, in a minority of states, by implication.").

III. PLAYING UNDER THE LIGHTS: CONTEMPORARY CONSIDERATIONS BRING PUBLIC POLICY FULL CIRCLE

> "When one landowner's use of his or her property unreasonably interferes with another's enjoyment of his or her property, that use is said to be a private nuisance."[59]

A. The Designated Hitter: Prah *and "Modern Lights"*

In the era of *Aldred's Case*, the sun was an important source of heat and lighting, and the air inside the home was only as good as the air outdoors. To permit the blocking or pollution of such sources of fundamental need would render a home uninhabitable. At the time *Fontainebleau Hotel Corp.* and much of its progeny was decided, there was a strong sense that the United States was exploding with growth, both within cities and westward. To adequately meet that expansion, social need demanded a policy of unrestricted development. Today, other interests tax the public's attention, and courts have only been able to meet those needs through reexamining *Fontainebleau* and its progeny, just as *Fontainebleau* assessed the legitimacy of the ancient lights doctrine in the context of its time. Increased interest in solar energy has, for example, caused some reconsideration of the traditional American attitude disfavoring prescriptive easements of light, air, and views.[60]

The use of solar energy is not a new concept, but rather is related to the policy underlying the advent of the ancient lights doctrine. In fact, the need for solar energy can be traced to ancient Roman society and their legal writings. Legally enforceable rights to solar energy as both a source of heat and illumination were common in Rome during the second and third centuries A.D.[61] In terms of heat, a severe timber shortage spawned the need for alternative sources of warmth.[62] The right to solar heat was further associated with the general right to light. Similar to early English society, the sun's light was vital to Roman society where often only dim, smoky oil lamps were available for artificial light.[63] An entire section of the Roman civil law prepared under Emperor Justinian, the Digest, is concerned with access to the sun's light and

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59. Prah v. Maretti, 321 N.W.2d 182, 187 (Wis. 1982).

60. *But see* Sher v. Leiderman, 226 Cal. Rptr. 698, 704 (Ct. App. 1986) ("Though the Solar Age may indeed be upon us, it is not so easily conceded that individual property rights are no longer important policy considerations."); *see also*, Kenneth James Potis, Note, *Solar Access Rights in Florida: Is There a Right to Sunlight in the Sunshine State?* 10 NOVA L.J. 125, 130 (1985) ("Since courts throughout the United States have repudiated the ancient lights doctrine, it is unlikely that this doctrine will ever assist a contemporary solar energy user.").

61. Potis, *supra* note 60, at 127.

62. *Id.*

63. Borimir Jordan & John Perlin, *Solar Energy Use and Litigation in Ancient Times*, 1 SOLAR L. REP. 583, 592-93 (1979).

energy.[64] The Digest preserves the ruling of the jurist Ulpian, who explained that there was no action for an object blocking the sun where its heat was not wanted. "If, however, that object is so placed as to block the sun's heat and create a shadow in a space where the sun's heat is essential . . ., there is a violation of the easement and the action is granted."[65] A builder was required to have a servitude over neighboring land if he were not to leave his neighbors a minimum or reasonable amount of daylight.[66] As the societal right to solar access outweighed the resulting burden on adjoining property, courts would often go so far as to force landowners to tear down a new structure that did not leave a neighbor with a reasonable amount of sunlight.[67]

Newfound concerns questioning the future availability of energy sources have recently caught the public's attention, causing courts to again address the relationship between the sun's energy and easements. The Wisconsin Supreme Court directly confronted the rationale of *Fountainebleau* and reconsidered the relationship between public need and ancient lights in *Prah v. Maretti*.[68] In that case, Richard Maretti planned to build a home adjacent to Glenn Prah's solar-heated residence. Prah had advised Maretti that if the new home were built on the proposed site it would shadow his solar collectors, thereby reducing the efficiency of and possibly damaging the system. Prah requested that Maretti locate his home several additional feet away from the lot line, but after receiving the necessary city approval, Maretti began construction on the initial site.[69]

The *Prah* court interpreted the maxim that a landowner must not "use the land in a way which injures the rights of others" from a more contemporary perspective than its *Fountainebleau* counterpart, concluding that "the uses by one must not unreasonably impair the *uses or enjoyment* of the other."[70] The court recognized that, although American courts had considered the doctrine of ancient lights inconsistent with the needs of a developing country, many jurisdictions protected landowners from malicious obstruction of access to light as in the spite fence cases. "If an activity is motivated by malice it lacks utility and the harm it causes others outweighs any social values."[71] Thus, even in rejecting ancient lights, American courts had a history of protecting a landowner's interest in sunlight supported by public policy.[72]

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64. *See* DIG. 8.2.17 (Ulpian, Ad Edictum 18).

65. Jordan & Perlin, *supra* note 63, at 594 (discussing DIG. 8.2.17 (Ulpian, Ad Edictum 18)).

66. *Id.* at 593.

67. Potis, *supra* note 60, at 127.

68. 321 N.W.2d 182 (Wis. 1982).

69. *Id.* at 185.

70. *Id.* at 187 (emphasis added).

71. *Id.* at 188.

72. *See* Foster, *supra* note 2, at 285 ("The spite fence exception proves significant because it affords a landowner, having no special easement to view, a superior right vis a vis another individual who wishes to maintain a fence which serves no useful purpose and which obstructs the complaining landowner's view. It is also significant in that it affords the landowner an action in nuisance against the individual who constructed the 'spite fence,' and thereby lends support to the

Armed with a social need standard, the court took issue with the "now obsolete" policy considerations underlying the American reluctance in the nineteenth and early twentieth century to provide broader protection for a landowner's access to sunlight.[73] The court first rejected the contention that American case law permits a landowner to use their property as they wish short of physically damaging a neighbor's property, finding that "society has increasingly regulated the use of land by the landowner for the general welfare."[74] Light easements were also abandoned since, with the advent of artificial light for illumination, sunlight was a personally aesthetic enjoyment.[75] The court again found that reasoning unfitting for contemporary needs, as "access to sunlight has taken on a new significance in recent years. . . . [S]unlight as an energy source is of significance both to the landowner who invests in solar collectors and to a society which has an interest in developing alternative sources of energy."[76] Similarly, as in *Fountainebleau*, courts had rejected light, air, and view easements based on the contention that they impeded land development. Yet encouraging

> unhindered private development in an expanding economy is no longer in harmony with the realities of our society. The need for easy and rapid development is not as great today as it once was, while our perception of the value of sunlight as a source of energy has increased significantly.[77]

Finally, the *Prah* court specifically confronted the reasoning of the mighty *Fountainebleau*:

> The [*Fountainebleau*] court leaped from rejecting an easement by prescription (the doctrine of ancient lights) and an easement by implication to the conclusion that there is no right to protection from obstruction of access to sunlight. The court's statement that a landowner has no right to light should be the conclusion, not its initial premise. The court did not explain why an owner's interest in unobstructed light should not be protected or in what manner an owner's interest in unobstructed sunlight differs from an owner's interest in being free from obtrusive noises or smells or differs from an owner's interest in unobstructed use of water. The recognition of a *per se* exception to private nuisance law may invite unreasonable behavior.[78]

The court concluded that private nuisance law is well equipped to resolve

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possibility of a more general action in nuisance for landowners suffering losses of view.").

73. *Prah*, 321 N.W.2d at 189.

74. *Id.*

75. Note that this premise parallels the English common law's concern with view easements. *See* discussion *supra* Part II.A.2.

76. *Prah*, 321 N.W.2d at 189.

77. *Id.* at 190 (citation omitted).

78. *Id.* at 190 n.13.

property development disputes in the 1980s.[79]

B. Free Agency: A Changing Role for Aesthetics

While the *Prah* court determined that private nuisance law was best structured to meet the balancing needs of both access to solar energy and development, courts generally have not yet been willing to extend nuisance protections to "merely" aesthetic nuisances.[80] As view rights have long been considered essentially aesthetic in nature, this reluctance to find aesthetic nuisances translates into a barrier to the recognition of view rights as well. Yet the disregard of aesthetic nuisance is entirely inconsistent with the approach courts have normally used to determine whether a landowner has suffered a substantial interference with the use and enjoyment of his or her property. Courts have long recognized the diminution in value standard as adequate in proving and valuing the cost of a nuisance,[81] a showing that can also be clearly evidenced through a view loss. Thus, "[t]he same standard for substantial interference should be applied to aesthetic nuisance cases as well."[82] Furthermore, the rationale underlying this unwillingness lacks the contemporary support necessary to maintain its viability. In short, the rule against aesthetic nuisances also needs a contemporary makeover.

Some courts, much like the Florida court in *Fontainebleau*, have based their reluctance to recognize aesthetic nuisances on the separation of powers doctrine, concluding that matters of aesthetics are best left to the judgment of legislative bodies to be controlled through such tools as zoning regulations. Yet the same is true of these courts' stated concern of protecting development. If the legislatures are in the best position to determine where to leave aesthetics open, the argument would necessarily hold true that they are also in the best position to determine where growth can occur and its respective limits. Additionally, this rationale is severely undermined by courts' willingness to use aesthetic considerations alone to substantiate a use of state police power.[83]

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79. *Id.* at 191 (Private nuisance law "has the flexibility to protect both a landowner's right of access to sunlight and another landowner's right to develop land[,]" especially since it is "more in harmony with legislative policy and the prior decisions of this court than is an inflexible doctrine of non-recognition of any interest in access to sunlight across adjoining land."). *But see* O'Neill v. Brown, 609 N.E.2d 835, 838-39 (Ill. App. Ct. 1993) (upholding Illinois' common law policy of favoring growth over ancient lights and rejecting a landowners right to a "solar skyspace easement" for a greenhouse).

80. Robert D. Dodson, *Rethinking Private Nuisance Law: Recognizing Aesthetic Nuisances in the New Millennium*, 10 S.C. ENVTL. L.J. 1, 2 (2002) ("An aesthetic nuisance is a substantial and unreasonable interference with the use and enjoyment of one's land resulting from unsightly objects or structures on another's land.").

81. *Id.* at 9.

82. *Id.*

83. *Id.* at 14; *cf.* Foster, *supra* note 2, at 287.

There are two significant problems with relying on zoning laws and ordinances to

For example, in *Metromedia, Inc. v. City of San Diego*,[84] the Supreme Court held that a sign ordinance which prohibited certain types of billboards was unconstitutional because the ordinance unnecessarily burdened protected speech. In doing so, the plurality opinion noted that while the ordinance in question was not necessary in promoting the aesthetic values of the city, aesthetics were nevertheless a "substantial government goal."[85] In his concurrence, Justice Brennan observed:

> I have little doubt that some jurisdictions will easily carry the burden of proving the substantiality of their interest in aesthetics. For example, the parties acknowledge that a historical community such as Williamsburg, Va., should be able to prove that its interest in aesthetics and historical authenticity are sufficiently important that the First Amendment value attached to billboards must yield. . . . And I would be surprised if the Federal Government had much trouble in making the argument that billboards could be entirely banned in Yellowstone National Park, where their very existence would so obviously be inconsistent with the surrounding landscape.[86]

A second rationale frequently employed by courts to reject aesthetic nuisances, while acknowledging the substantial interference with the use and enjoyment of land based on aesthetic harms, is that such harms can privately be avoided through the use of restrictive covenants.[87] No one doubts that aesthetic nuisances may be avoided through restrictive covenants. The rooftop owners and the Cubs organization have opted to contract for the view right at issue in the principal lawsuit, suggesting that the market will naturally protect valuable aesthetics. Yet a landowner will not always have the financial means available

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> protect property views. First, both are subject to modification, and second, even if an adjoining landowner constructs a structure in violation of a building regulation which obstructs an individual's light, air or view, the individual may not be allowed to recover damages for the interference absent an easement for light, air, or view over the adjoining land; the theory being that one cannot recover damages for that to which they have no right.

Foster, *supra* note 2, at 287 (citations omitted).

84. 453 U.S. 490 (1981); *see also* Welch v. Swasey, 214 U.S. 91, 106-08 (1909). In *Welch*, dating back to the early twentieth century, the Court found that legislation disproportionately limiting building height throughout Boston was valid as it was enacted "for the safety, comfort, or convenience of the people, and for the benefit of property owners generally." *Welch*, 214 U.S. at 106. The Court explained, "that . . . considerations of an [a]esthetic nature also entered into the reasons for their passage, would not invalidate them." *Id.* at 108.

85. *Metromedia*, 453 U.S. at 507-08.

86. *Id.* at 533-34 (Brennan, J., concurring) (citation omitted); *see also* Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 817 (1984) (holding that aesthetics were a substantial governmental interest which might, in appropriate cases, outweigh First Amendment concerns).

87. Dodson, *supra* note 80, at 14.

to the rooftop owners to purchase the easement. Additionally, private agreements are equally available for all other nuisances, yet courts do not restrict landowners to only contractual limits on nuisances. The open market could easily provide a natural limit to the interpretation of peace and quiet just as easily as it can prevent the obstruction of a view. To the contrary, however, courts do not require a homeowner to contract for quiet enjoyment with their surrounding neighbors. Furthermore, those who rely on restrictive covenants necessarily assume that nuisance law simply serves the purpose of filling gaps that other areas of the law, such as zoning and restrictive covenants, leave open. "This is simply not the case."[88] Courts have noted, for example, "that simple compliance with zoning regulations does not preclude private nuisance actions to enjoin activity on land which is a nuisance."[89]

Courts that have failed to address aesthetic concerns have confused the standards for nuisance law because of their preoccupation with avoiding issues of aesthetic beauty. Yet in determining aesthetic nuisances, courts are not asked to render decisions on beauty in order to distinguish reasonable from unreasonable land uses. Rather, courts need only ascertain a reasonable use by determining whether the alleged aesthetic nuisance is out of conformity with existing land use in the surrounding community.[90] Judicial recognition of aesthetic nuisances is therefore long overdue. Courts and legislatures alike have recognized the role of aesthetics throughout the law, and there is no longer justification for a flat rule prohibiting the reach of nuisance law into aesthetic concerns.[91]

C. Instant Replay: Recognizing Public Policy from Aldred *to* Prah

There are really two vantage points from which one can assess history's treatment of easements to light, air, and view. The first, and seemingly the easiest answer, would be to look upon the respective pronouncements as establishing foundational principles of common law that serve as the basic legal structure around which courts can base future decisions. That is, to say the "law" of historic England with respect to easements was ancient lights but not ancient views, and the American "law" has been that there are no light, air, or view easements. In either instance, the distinguishing case law would serve as only fact-based exceptions to the steadfast rules. A second look, the "instant replay," would suggest that the respective decisions were not the foundation itself, but rather only interpreted the real underlying "law" of nature's easements and applied it to the overarching context of the particular time. The latter view implies a common thread running from the earliest common law to the present. In taking the second look and juxtaposing the major decisions of the respecting periods, it becomes evident that the easier answer is that property rights in light,

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88. *Id.* at 15.
89. *Id.*
90. *Id.* at 18.
91. *Id.* at 21.

air, and view have, in fact, consistently been recognized or rejected based on the public policy needs of the respective times.

The *Prah* court recognized that "[w]hat is regarded in law as constituting a nuisance in modern time would no doubt have been tolerated without question in former times."[92] In terms of rights in light, air, and views, the change has always hinged on society's growing needs. The same held true even prior to the English common law, as Roman law enforced solar rights as an important source of light and heat.[93] Roman society's harsh enforcement stemmed from a severe timber shortage. Public policy of the time demanded retribution of an infringement through unblocking the source of the necessity, as monetary remedies would not protect the important need at stake.

Similarly, the early English approach developed from the underlying concerns of contemporary society.[94] Solar light remained an important source of warmth and room lighting, but nascent concerns of development and growth forced some reconsideration of an absolute right to the sun's treasures. The balance still weighed heavily in favor of light needs, but limits were placed to reflect the additional interests. The light right was essentially restricted to what was actually required and used by a landowner. Population growth coupled with more slowly developing technologies would also attune the public's interest to a policy of preserving unpolluted air. Views were distinguished as lacking societal necessity.

Initially, American needs in terms of light, air, and view mirrored that of their English brethren, but then something changed. The social need pendulum swung mightily to favor outright growth.[95] Air, light, and view easements would have hindered the rapid expansion inward and westward. The notion that utility and public need has always remained the underlying "rule" is evident in the courts' continuing application of that principle. Even at the pinnacle of the United States' supposed outright rejection of the common law, in *Fontainebleau*, the court would only permit a light obstruction where the imposing structure "serves a useful and beneficial purpose."[96] One of the prevalent exceptions to that holding, the spite fence cases addressed in *Prah*, was little more than a balancing test weighing the purpose of the fences against the social benefits.[97] When courts decided to re-examine the contemporary relevance of the judicial application, they did so in the wake of the then obsolete unbridled growth rationale. Social welfare necessitated reinstating light easements for solar energy sources.[98]

It is evident that the law of light, air, and view property rights has forever

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92. Prah v. Maretti, 321 N.W.2d 182, 190 (Wis. 1982) (quoting Ballstadt v. Pagel, 232 N.W. 862 (1930)).

93. *See supra* notes 61-67 and accompanying text.

94. *See supra* notes 19-43 and accompanying text.

95. *See supra* notes 44-58 and accompanying text.

96. *See supra* note 54 and accompanying text.

97. *See supra* note 72 and accompanying text.

98. *See supra* notes 73-79 and accompanying text.

been a law of public need, the administration of which has at certain junctures throughout history changed in furtherance of our perception of the most pressing social need. The approach of leading courts has remained constant; they each weighed the benefits of light, air, and view rights in light of the overarching public policy of their time. As a result, rather than presuming the American common law regarding light, air, or view rights to be a general rejection, courts would be better served by a standard evaluating the competing considerations to determine whether public policy weighs in favor of such a right, and rule accordingly.

IV. BRICKS & IVY: THE MEETING PLACE OF HISTORY AND A VIEW

> "[T]he category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind."[99]

A. A Call to the Pen: Extending Contemporary Interests to a View

At this junction one may begin to note that this inherent public policy standard has generally only applied to permit prescriptive easement rights in light and air, while English and American courts alike have rejected view servitudes. The principle has apparently been stretched to it limits. Yet just as a baseball team refreshes pitchers late in the game to meet its redeveloping circumstances, application of easement and nuisance law needs refreshed to meet the contemporary needs of society. The view right, occupying the same position in the legal lineup, has been awaiting its chance to keep the law at pace with the public need. Where the proper balance is struck, thereby creating a view right that serves a public benefit far outweighing its restrictive costs, courts should not hesitate to extend the standard afforded light and air rights to view rights.

A view from a particular vantage point often enhances the value of that tract of land. "To see the ocean, the mountains, a forest, a lake, or a river from one's land may be an aesthetic delight. Such a benefit, while intangible, may enhance market value, with buyers willing to pay extra for the view."[100] Property owners and states alike have shown a desire to preserve land values through the protection of these financially and socially valuable views. Landowners have inundated courts across the country with a variety of lawsuits meant to protect their property views.[101] States have recognized the interest by giving careful consideration to view obstruction when compensating individuals in eminent domain proceedings, and have taken zoning regulations "beyond the realm of health and welfare and into the realm of aesthetics and view preservation."[102]

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99. DALTON, *supra* note 22, at 187 (quoting Lord St. Leonards in Dyce v. Hay, 1 Macq. 305 (1852)).

100. JACQUELINE P. HAND & JAMES C. SMITH, NEIGHBORING PROPERTY OWNERS § 5.06 (1988 & Supp. 2000).

101. Foster, *supra* note 2, at 288.

102. *Id.* at 288-89; *e.g.*, William C. Haas & Co. v. City and County of San Francisco, 605 F.2d

Yet American courts have generally maintained their refusal to extend judicial protection to view rights. This reluctance stems almost entirely from the American court system's unwillingness to protect access to light and air due to their concern for impeding land development.[103] There is, certainly, nothing inherently wrong with lumping light, air, and view rights into the same genre. Easements of light and air are quite similar to view access, and the interests often coexist to a great extent. "A structure that blocks sunlight is likely also to obstruct the view, and vice versa."[104] Just as the three rights share common characteristics, they also have historically endured the same treatment.[105] Even English courts, which are generally recognized as distinguishing light and air from a view, originally treated all three as natural rights until view rights were found to lack the public necessity of light and air access.[106] Of course the public policy underlying the United States' refusal to protect the three rights, the need for unbridled growth, has correctly been called into question in recent years "thus opening the door to other kinds of actions for the recognition and protection of rights to light, air, and view."[107]

The reasoning underlying the *Prah* court's extension of a private nuisance action to the obstruction of sunlight could likewise protect view obstructions while accounting for competing concerns. In *Tenn v. 889 Associates*,[108] the Supreme Court of New Hampshire considered whether the law of private nuisance provided the appropriate standard for examining a property owner's claim that a neighboring construction would interfere with her interests in light and air. Justice Souter, then a member of the New Hampshire court, explained necessary growth of the nuisance law's reach:

> The present defendant urges us to adopt the *Fountainebleau* rule and thereby to refuse any common law recognition to interests in light and air, but we decline to do so. If we were so to limit the ability of the common law to grow, we would in effect be rejecting one of the wise

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1117, 1120 (9th Cir. 1979) (noting that the general welfare was promoted by restrictions that decreased population density, that preserved available light and air, and that saved an aesthetic view enjoyed by the entire city). A broader reading often given the takings clause "may even suggest a 'right' to view, running with land ownership, when government's [sic] physically interfere with property owner's land in such eminent domain proceedings." Foster, *supra* note 2, at 284. The Supreme Court, half a century ago, recognized the relationship between aesthetics and the public interest. In determining that a city could condemn private property to rid an area of a slum and develop a more attractive environment, the Court held that, "[t]he concept of public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary." Berman v. Parker, 348 U.S. 26, 33 (1954).

103. Foster, *supra* note 2, at 289.

104. HAND & SMITH, *supra* note 100, § 5.06.

105. Foster, *supra* note 2, at 270.

106. *See supra* notes 31-33 and accompanying text.

107. Foster, *supra* note 2, at 289.

108. 500 A.2d 366 (N.H. 1985).

> assumptions underlying the traditional law of nuisance: that we cannot anticipate at any one time the variety of predicaments in which protection of property interests or redress for their violation will be justifiable . . . . That is, because we have to anticipate that the uses of property will change over time, we have developed a law of nuisance that protects the use and enjoyment of property when a threatened harm to the plaintiff owner can be said to outweigh the utility of the defendant owner's conduct to himself and to the community.[109]

Both the *Prah* and *Tenn* courts stressed the necessary and inherent nature of nuisance law to adapt to contemporary needs and fundamentally serve to protect broad land enjoyment.[110] Extending private nuisance to view interests would allow courts to apply the public policy standard on a case-by-case basis, balancing the utility of the conduct inhibiting the view against the actual and communal harm caused by such conduct.[111]

Of course, a view across a neighbor's property may have value beyond the oft cited aesthetic significance. In *Justice v. CSX Transportation, Inc.*,[112] the Seventh Circuit relied on nuisance law to protect sightlines from an automobile. In that case, a large building coupled with several parked railroad cars obstructed a motorist's view of an oncoming train.[113] In a wrongful death action, the court imposed on the building owner a duty not to obstruct sightlines so as to create an unreasonable risk of injury to highway users.[114] Writing for the court, Judge Posner examined the case as a land use conflict between two neighbors. "The neighbor in this case is Jasper County, which owns the road on which Justice was killed. . . . The [defendant] was interfering with the use of a neighbor's land, the county's; the estate of Justice sues in effect as the county's surrogate."[115] The court relied on general principles of nuisance and negligence to protect the "neighboring view," explaining that "[t]he law requires a reasonable

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109. *Id.* at 370.

110. Foster, *supra* note 2, at 292; *see also* Foley v. Harris, 286 S.E.2d 186, 190-91 (Va. 1982) ("The phrase 'use and enjoyment of land' is broad. It comprehends the pleasure, comfort and enjoyment that a person normally derives from the occupancy of land. Freedom from discomfort and annoyance while using land, which inevitably involves an element of personal tastes and sensibilities, is often as important to a person as freedom from physical interruption with use of the land itself.").

111. *Cf.* Foster, *supra* note 2, at 292-93. *But see* HAND & SMITH, *supra* note 100, § 5.06 ("The *Prah* approach to solar access could be extended to views, but this extension is unlikely. In the solar context, the harm to the user of sunlight is in large part the capital expenditure for solar facilities that are worthless without light. A landowner who has enjoyed a favorable view, however, generally has not incurred a similar expense in reliance upon the continued availability of the view.").

112. 908 F.2d 119 (7th Cir. 1990).

113. *Id.* at 121.

114. *Id.* at 124.

115. *Id.* at 123-24.

accommodation of competing land uses, rather than the surrender of one user to another."[116] The concept of granting recognition of view rights in a landowner whose property abuts a public street is a significant exception to "otherwise rigid rules allowing for creation of a right to view in the limited circumstances of an express grant or covenant, and it tends to suggest that courts have gone too far in holding that absent such a grant or covenant no right to view exists."[117]

Over seventy-five years ago the Supreme Court recognized that "with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities."[118] View rights are one such problem which may often require additional use restrictions. They often represent valuable interests both aesthetically and to the public's health, safety, and welfare. The *Prah* court's observation is equally applicable here:

> Courts should not implement obsolete policies that have lost their vigor over the course of the years. The law of private nuisance is better suited to resolve landowners' disputes about property development [today] than is a rigid rule which does not recognize a landowner's interest in access [to a view].[119]

As a result, where a strong public policy supports a right to an unobstructed view, courts should apply nuisance law to protect that interest.

B. The National Pastime: A Policy of Preserving History and Its Aesthetic Value

> "[S]tructures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today."[120]

It is not suggested that a right to a view should extend to a landowner whenever there is significant value invested in the view and relied upon by the owner. The standard advocated here is not one of balancing the potential value neighboring owners stand to gain or lose from the blocking of a view. Rather,

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116. *Id.* at 124.

117. Foster, *supra* note 2, at 281. *But see* HAND & SMITH, *supra* note 100, § 5.06 (arguing that the public county should not be endowed with uncertain common-law property rights to limit visual obstructions since it can impose building restrictions and setbacks to achieve the public interest in protecting sightlines).

118. Village of Euclid v. Ambler Realty Co., 72 U.S. 365, 386-86 (1926) (continuing that the application of constitutional guaranties "must expand or contract to meet the new and different conditions which are constantly coming within the filed of their operation").

119. Prah v. Maretti, 321 N.W.2d 182, 190 (Wis. 1982).

120. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 108 (1978).

the interest should only be protected where society stands to suffer a great public loss from restricting such views. A landowner would still need to demonstrate a public policy strong enough to outweigh the neighboring interests in creating any view impediment. One such interest recognized consistently by courts and legislatures alike, the public policy of preserving history and its aesthetic value, provides an example of a societal need sufficiently compelling to impose the protection of a view.

The preservation of historical value is in no way a new concept in American law. Stretching its roots back to the late nineteenth century, the preservation of historically and culturally significant sites, buildings, and structures as an established national policy has been proclaimed since the early twentieth century.[121] Though the policy has continually existed, the nation's preoccupation with expansion and development somewhat clouded the public's interest until the latter part of the twentieth century.[122] Today, however, with the declining need for unhindered expansion and development, the American public has become increasingly more protective of historical structures and communities.[123] What has always been an important public policy has in many contexts evolved into a strong public need.

The early American ideal of historic preservation can be characterized as an aspiration of "patriotism and civic education."[124] The government's initial involvement took the form of specific acts, passed by Congress, designating particular spaces as national monuments to prevent the destruction of national treasures.[125] As requiring such individual acts proved more and more cumbersome, Congress passed the Antiquities Act of 1906,[126] giving the President the administrative authority to designate historical sites and properties.[127] The 1906 Act, however, was limited to federal lands and served only to protect national landmarks and structures "from destruction by individual looters and exploiters."[128]

Ultimately, the Antiquities Act proved to be too limited for the purposes of historic preservation, even in the growth-focused circumstances of its time. The

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121. Joe P. Yeager, *Federal Preservation Law: Sites, Structures & Objects*, 8 WIDENER L. SYMP. J. 383, 383 (2002). Preserving historical property can be defined as "protecting and encouraging the restoration of historically significant buildings and city districts from haphazard destruction and over neglect." *Id.*

122. Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 474 (1981).

123. Yeager, *supra* note 121, at 384 ("In short, there seems to be something for everyone in historic preservation."); Rose, *supra* note 122, at 476.

124. Mark D. Brookstein, Note, *When History is History: Maxwell Street, "Integrity," and the Failure of Historic Preservation Law*, 76 CHI.-KENT L. REV. 1847, 1853 (2001) (citing Rose, *supra* note 122, at 479-80).

125. Yeager, *supra* note 121, at 387.

126. 16 U.S.C. §§ 431-433 (2000).

127. Yeager, *supra* note 121, at 387.

128. *Id.* at 388.

federal government therefore enacted the Historic Sites, Buildings, and Antiquities Act of 1935,[129] which sought to enlarge the scope of historic preservation.[130] The 1935 Act expanded the federal commitment to preservation and protection of historic treasures regardless of their location, and for the first time declared a national policy "to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States."[131] The buildings and structures needed only to be "nationally significant and *preserved for [a] public benefit*" to be protected.[132] Congress supplemented the 1935 Act with the National Trust for Historic Preservation Act of 1949,[133] which created a non-profit corporation to serve as a collection point for public efforts and donations in preserving the national historic interest.[134]

As concerns for historic preservation matured, a second theme developed which shifted concentration from largely patriotic significance to a focus on aesthetic issues and recognizing the significance of areas and communities rather than merely structures.[135] This era witnessed the arrival of "historic districting for aesthetic and [even] economic purposes"[136] and is embodied in the passage of the National Historic Preservation Act of 1966.[137]

Congress enacted the National Historic Preservation Act as a response to the "destruction of [many] aging, but historically significant, buildings [in] the economic boom following World War II."[138] Of course, "historic preservation has always been a thorn in the side of developers and private landowners."[139] The Act's legislative history captures the tension between urban development and preservation, a common theme in most American property rights issues:[140]

> [M]any [significant structures] which are worthy of protection because of their historical, architectural, or cultural significance at the community, State or regional level have little protection given to them against the force of the wrecking ball. . . . It is important that they be brought to light. . . . Only thus can a meaningful balance be struck between preservation of these important elements of our heritage and

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129. 16 U.S.C. §§ 461-467.

130. Brookstein, *supra* note 124, at 1856.

131. Yeager, *supra* note 121, at 388-89 (citation omitted).

132. *Id.* at 389 (emphasis added).

133. 16 U.S.C. § 468.

134. Yeager, *supra* note 121, at 390. "The National Trust continues to be a public spokesman for historic preservation and is easily the most visible proponent of conservation and legal issues surrounding historic preservation law." *Id.* at 390-91.

135. Brookstein, *supra* note 124, at 1857.

136. *Id.*

137. 16 U.S.C. §§ 470 to 470x-6.

138. Yeager, *supra* note 121, at 391.

139. *Id.* at 384.

140. Brookstein, *supra* note 124, at 1860.

> new construction to meet the needs of our ever-growing communities and cities.[141]

Yet the growing strength of the public interest tipped the balance in favor of preservation. Congress declared in the Act that "the spirit and direction of the Nation are founded upon and reflected in its historic heritage" which "should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people."[142] They continued, "the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans."[143] The overarching effect of the 1966 Act was to broaden the preservation scope to include properties of state and local importance and to add districts and cultural values as objects deserving protection[144]

A third and still emerging stage of historic preservation has shifted the focus "to consideration of how the physical environment relates to the community and the individual's place within that community."[145] This new characterization stresses the "'sense of place' that older structures lend to a community, giving individuals interest, orientation, and sense of familiarity in their surroundings."[146] The roots of this posture are evident in the legislative history of a 1980 amendment to the National Historic Preservation Act:

> First and foremost . . . the goal of historic preservation is to provide the citizens of our nation with an understanding and appreciation of their cultural origins and heritage. It is to foster a long-range perspective of our human use of the land and its resources, of the development of our communities and politics, of our technologies and arts. It is directed toward protection and enhancement of modern remnants of our architectural and engineering traditions—for our immediate appreciation and use—and of the heritage information that is inherent in our prehistoric and historic resources—which serve to tie us to the lessons and achievements of the past. Historic preservation does not inhibit appropriate development. It is, rather, a partner, one that has proven its effectiveness.[147]

Professor John Nivala has captured this growing recognition in discussing the community importance of what he calls our "built environment."[148] Nivala explains that our communities' structures "engage[] more than our aesthetic

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141. H.R. REP. NO. 89-1916 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3307, 3309.

142. 16 U.S.C. § 470.

143. *Id.*

144. Yeager, *supra* note 121, at 391.

145. Brookstein, *supra* note 124, at 1862 (citing Rose, *supra* note 122, at 489).

146. Rose, *supra* note 122, at 480.

147. H.R. REP. NO. 96-1457 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6378, 6384.

148. Nivala, *supra* note 1, at 1.

sense. It engages all of our senses, it awakens our memories, it fuels our aspirations. This built environment is more than just depiction; it is representation. We ascribe personal and cultural meanings to the significant structures of our built environment."[149] He reasons that society's preservation needs are more extensive than considering individual monuments, buildings, and structures. Rather, "[w]e need, individually and culturally, an environment" that serves as our "orientation and identification, individually and culturally," and "which is not simply well organized but poetic and symbolic as well."[150]

Nivala premises the importance of preserving a well built environment on its "connect[ion] with the people who inhabit it. These structures meet the inhabitants' basic biological needs for light and air, for seeing and hearing, their cultural needs for strong integrative symbols, and their individual psychological need for a sense of place."[151] What gives a structure environmental significance "depends not only on its relationship to other structures but also its relationship to those who come together in that environment,"[152] because although "a building has physical boundaries, its meaning and value depend on its relationship to the city outside them."[153] Our cities are more than mere aggregations, they are "creations 'of imagination, a collectivity of associations assembled over time in response to human need and aspirations,'" associations that can be "'kept intact by preserving their physical hosts,' the structures which can be viewed."[154] Thus, a particular place is "a qualitative, 'total' phenomenon which we cannot reduce to any of its properties, such as spatial relations, without losing its concrete nature out of sight."[155]

Of course, not all structures and their "places" merit such recognition. Significant structures are those that "define the very character of our surroundings. It is not because the structure is singularly beautiful, but because it has contributed to 'the actual beauty of the strong, finely detailed, self-assured place.'"[156] Nivala recognizes a two-fold inquiry into determining what places should be protected:

> The standards governing selection "should address two considerations: validity of the claim that an environmental feature has actually become an icon in the community mind; and the likelihood that it is amenable to regulation by the land use tools employed in aesthetic regimes." The

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149. *Id.* at 2.

150. *Id.* at 5-6.

151. *Id.* at 12.

152. *Id.* at 8.

153. *Id.* at 54.

154. *Id.* at 13 (citing JOHN J. COSTONIS, ICONS AND ALIENS: LAW, AESTHETICS, AND ENVIRONMENTAL CHANGE 86 (1989)).

155. *Id.* at 10 (citing CHRISTIAN NORBERG-SCHULTZ, GENIUS LOCI: TOWARDS A PHENOMENOLOGY OF ARCHITECTURE 7-8 (1980)).

156. *Id.* at 8 (quoting PAUL GOLDBERG, THE CITY OBSERVED, NEW YORK: A GUIDE TO THE ARCHITECTURE OF MANHATTAN 55 (1979)).

> standards governing protection "should take into account the distinctive features of the icon in question and should be drawn to prevent or minimize associational dissonance between that icon and prospective aliens."[157]

The only places that merit protections are those that have achieved significant status. "[T]hey must be landmarks."[158] There remains, also, the ever present cost-benefit analysis, ensuring that "self-interest does not waste a resource that benefits everyone or creates a situation that, by its disruption, harms the greater number."[159]

When a place does have the aura of significance, its preservation can prove exceedingly valuable to society. The preserved built environment "serves as both a record of the past and our pronouncement to the future."[160] Whether individual or social, "once that certain construct 'establishes itself in an actual place, it has a peculiar way of muddling categories, of making metaphors more real than their referents; of becoming, in fact, part of the scenery.' Those constructs are a key to understanding ourselves and our position in our culture."[161] Such structures provide society with stories about "their own making, . . . the historical circumstances under which they were made, and . . . they also reveal truth."[162] Respecting these places "recognizes the power of our past—its ideas, values, and culture—to inform our present ideas, values and culture,"[163] without which "our built environment loses 'those qualities which allow for man's sense of belonging and participation."[164]

Nivala concludes that "we cannot develop an individually and culturally sustaining identity in a constantly recreated environment."[165] The societal importance of preservation is evident:

> The structures—new and old—of our built environment affect our well being by encouraging, supporting, and enriching our 'vivid sense of the present, well connected to future and past, perceptive of change, able to manage and enjoy it.' Those structures of our built environment make sense only in relation to each other, 'in combination, . . . in context, [and] in time.' Our built environment cannot be a static environment because it is inhabited; it must respond to the changing and expanding needs of the inhabitants without destroying their sense of place. To conclude that '[o]ur past is inextricably linked to our future' does not

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157. *Id.* at 29 (quoting COSTONIS, *supra* note 154, at 84).

158. *Id.* at 30.

159. *Id.* at 24.

160. *Id.* at 54.

161. *Id.* at 10 (quoting SIMON SCHAMA, LANDSCAPE AND MEMORY 61 (1995)).

162. *Id.* at 14 (quoting NORBERG-SCHULTZ, *supra* note 155, at 185).

163. *Id.* at 4.

164. *Id.* at 8 (quoting CHRISTIAN NORBERG-SCHULZ, ARCHITECTURE: MEANING AND PLACE: SELECTED ESSAYS 181 (1988)).

165. *Id.* at 53.

> mean that the past is a burden on that future. Preservation is not paralysis.[166]

Preservation today should therefore focus not on individual structures, but rather in "the management of change in our built environment,"[167] and recognize the effect the experience of an entire "place" can have on our social well-being.

A great deal of historical protection has grown out of state and local efforts. State and local governments are more attuned to the significance of both historic buildings and districts, and often offer greater protection from the destruction of significant places by imposing civil and even criminal penalties against violators.[168] Take, for example, the policies of the State of Illinois, the setting of the principal lawsuit:

> It is hereby found and declared that in all municipalities the movements and shifts of population and the changes in residential, commercial, and industrial use and customs threaten with disappearance areas, places, buildings, structures, works of art and other objects having special historical, community, or aesthetic interest or value and whose preservation and continued utilization are necessary and desirable to sound community planning for such municipalities and to the welfare of the residents thereof. The granting to such municipalities of the powers herein provided is directed to such ends, and the use of such rights and powers for the preservation and continued utilization of such property is hereby declared to be a public use essential to the public interest.[169]

More locally, the City of Chicago requires that "[c]onstruction work on landmarks requires a city permit and must be approved by the Commission on Chicago Landmarks to ensure it does not detract from the significant historical and architectural features of the building or district."[170]

Of course, the judiciary also has had its say in elevating the societal importance of, and community need for, historic preservation. The courts have, in general, long determined that the government has broad authority over land use, as long as the proposed use benefits the public.[171] The more specific question of whether the government's protection of historic places "constitutes a valid public purpose was at the heart of the first significant preservation legal case."[172] In *United States v. Gettysburg Electric Railway Co.*, the Supreme Court held that preservation of a historic battlefield by Congress constituted a public

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166. *Id.* at 41-42 (citations omitted).

167. *Id.* at 39.

168. Yeager, *supra* note 121, at 385.

169. 65 ILL. COMP. STAT. 5/11-48.2-1 (2004).

170. City of Chicago Department of Planning & Development, Landmark Designation Program, *available at* http://www.egov.cityofchicago.org (last visited Feb. 25, 2005).

171. Yeager, *supra* note 121, at 400.

172. Christopher J. Duerksen, *Is Preservation a Valid Public Purpose*, *in* 2 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 19:3 (4th ed. 2004).

purpose.[173] In a case to condemn private land for the creation of a national battlefield, the Court rejected a constitutional challenge which claimed the taking was not a public purpose, finding that there existed fundamental implication of necessity. "Thus, for the first time, the Supreme Court ruled that preservation of a historic site was a valid exercise of government power . . . ."[174]

Virtually every state court taking up preservation challenges has also rejected the argument that there was not a public need.[175] The Massachusetts Supreme Court, for example, held half a century ago that the establishment of a historic district was justified as an act for the promotion of the public welfare.[176] The court further opined that more weight should be "given to aesthetic consideration."[177] In an extension of the validation of visual protection, "the Massachusetts Supreme Court noted the rationale that tourists wanted to see the area as it had always looked."[178]

In the much publicized *Penn Central Transportation Co. v. City of New York*,[179] the Supreme Court finally "laid to rest the notion that aesthetic considerations alone are not a proper basis for the use of the government's police power in a preservation context," thus settling that preservation facially serves a valid public purpose.[180] Justice Brennan, writing for the Court, recognized the positive effects that the preservation of aesthetic qualities can have on the community at large. "[S]tructures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today."[181] One commentator explained the significance of Brennan's opinion:

> While Justice Brennan clearly refers to aesthetics in the sense of quality and beauty, by including the word 'cultural,' a broader reading of aesthetics is implied. What is important in preserving cultural heritage rests in preserving the particular aesthetic that an area may have. While this may include exquisite architecture, it is not limited to such, and may encompass the preservation of an aesthetic that makes the area culturally

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173. 160 U.S. 668, 680-81 (1896).

174. Duerksen, *supra* note 172. Note, though, that "[p]reservation and aesthetic regulation did not begin to stand on its own two feet until a 1954 U.S. Supreme Court decision, *Berman v. Parker*, an urban renewal case, announced strong support for government action based on aesthetics." *Id.* (citing Berman v. Parker, 348 U.S. 26 (1954)); *see also supra* note 102.

175. Duerksen, *supra* note 172.

176. Opinion of the Justices to the Senate, 128 N.E.2d 557, 562 (Mass. 1955).

177. *Id.* at 561.

178. Rose, *supra* note 122, at 507; *Opinion of the Justices to the Senate*, 128 N.E.2d at 562 ("[T]hat the sedate and quaint appearance of the old island town has to a large extent still remained unspoiled and in all probably constitutes a substantial part of the appeal . . . .").

179. 438 U.S. 104 (1978).

180. Duerksen, *supra* note 172.

181. *Penn Cent.*, 438 U.S. at 108.

> or historically significant. A factor thus emerges that considers the particular aesthetic of the area where the historically or culturally significant activity took place.[182]

The Court therefore decided that preservation control on Grand Central Station did not amount to a "taking" even though the owners lost millions of dollars in leasing arrangements.[183]

In short, preservation serves an important and necessary public purpose of "strengthen[ing] local community ties and community organization."[184] Preservation should not be "merely about preserving buildings or structures, but [should also be] concerned with preserving a historical essence or importance."[185] While society may not be able to "designate every square inch of an area where a significant activity took place," it is possible to determine the "focal point, or axis" around which communities find their important ties and sense of awareness.[186] Such an important public need would serve as the basis for preserving an unobstructed view that carried the requisite social significance.

C. Rounding Third: The Historic Value and Preservation of the Rooftop Views

The table has been set. The epoch of light, air, and view property rights have been reconsidered, revealing a consistent underlying theme of adhering to public policy. A strong public policy has also been identified in this country's concern for historic preservation. What then of the forum used to reexamine the treatment of light, air, and view rights: the competing interests of the Chicago Cubs baseball organization and the Wrigleyville rooftop owners? The concluding question remains as to whether the views from the rooftops are historically significant enough that preventing their obstruction is a strong public interest. As the rooftop views are an essential part of Wrigley Field, which is a historical enshrinement representing the best of baseball, and in light of baseball's fundamental importance to American society, the answer appears to be affirmative.

Baseball's place in the heart of our nation has been well documented and needs little validation here. The Supreme Court itself declared over thirty years ago that "[b]aseball has been the national pastime for over one hundred [and fifty] years and enjoys a unique place in our American heritage."[187] Courts of all level and jurisdictions have elaborated on baseball's central place in our society. One of the more recent explanations of baseball's importance by a court was that

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182. Brookstein, *supra* note 124, at 1858.

183. Rose, *supra* note 122, at 477.

184. *Id.* at 479.

185. Brookstein, *supra* note 124, at 1854.

186. *Id.* at 1855.

187. Flood v. Kuhn, 407 U.S. 258, 266 (1972). *But see* Keslar v. Police Civil Serv. Comm'n, City of Rock Springs, 665 P.2d 937, 946 n.1 (Wyo. 1983) (Brown, J., dissenting) ("For many years baseball was thought to be the national pastime. I now believe it to be litigation.").

"[b]aseball is as American as turkey and apple pie. Baseball is a tradition that passes from generation to generation. Baseball crosses social barriers, creates community spirit, and is much more than a private enterprise. Baseball is a national pastime."[188] Whether or not a fan of the game, its extreme public importance is evident, and what is essential to baseball would likewise be a necessary part of baseball's social magnitude.

If baseball is the nation's pastime, then Wrigley Field is its time capsule. Baseball parks are themselves an important element of the game. A ballpark is "above all else . . . personal. It's about relationships, with teams and the communities they serve, and memories, of special places at special times. [They are] stages upon which the game's greatest moments have been acted out, the context around which its greatest accomplishments can be measured."[189] Built in 1914, and one of the few remaining "old time" ballparks, most commentators universally agree that there is no equal to Wrigley Field.[190] Wrigley's appeal is derived from its unchanging character:

> While baseball's oldest ballparks close their gates one after another, their proud structures humbled by the years, their nostalgia outdone by luxury boxes, Wrigley Field remains a time capsule of the game. It looks the same as it did on that day in 1932 when Babe Ruth called his famous home run, and will stay that way well into the next century.[191]

Wrigley field is uniquely historic, with its significance grounded upon its unparalleled and unvarying atmosphere.

"Baseball, more so than any other sport, is about experiencing the ballpark as much as the ball game[,]"[192] and the rooftop views of Wrigleyville are as much a part of Wrigley Field as Wrigley Field is a part of baseball. In their response to the principal lawsuit, the rooftop owners pointed out that the rooftops have

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188. Metro. Sports Facilities Comm'n v. Minn. Twins P'ship, No. CT 01-16998, 2001 WL 1511601, at *1 (Minn. Dist. Ct. Nov. 16, 2001).

189. RON SMITH, THE BALLPARK BOOK: A JOURNEY THROUGH THE FIELDS OF BASEBALL MAGIC 1 (2003).

190. *See e.g.*, Joe Mock, *Wrigley Collection*, Baseballparks.com, *at* http://www.baseballparks.com/WrigleyHistory.asp (2005) ("[T]here has never been—nor will there ever be—the equal of this great edifice."). In 2003, ESPN.com ran a series rating Major League Baseball's thirty ballparks. As per Wrigley Field, columnist Jim Caple wrote that of all the places "to take foreign visitors anywhere in the United States for the very best experience this country can provide . . . three places [] are quintessentially American: Disneyland, the Yosemite Valley and Wrigley Field. . . . [Wrigley Field is] the happiest place and most beautiful location in baseball." Jim Caple, *Wrigley's More than a Breath of Fresh Air*, ESPN.com, *at* http://espn.go.com/page2/s/ballparks/ wrigley.html (2005). Sports Illustrated has named Wrigley Field as the sixth greatest venue in the world, calling it a "national treasure." Mock, *supra*.

191. Mock, *supra* note 190 (quoting Associated Press article *Glorious Wrigley*, *available at* www.baseballparks.com/wrigleyquotes.asp).

192. IRA ROSEN, BLUE SKIES, GREEN FIELDS: A CELEBRATION OF 50 MAJOR LEAGUE BASEBALL STADIUMS 1 (2001).

historically been a part of the Wrigley Field experience, a contention affirmed even by the Cubs' management.[193] Commentators agree that "the surrounding neighborhood is part of the Wrigley experience."[194] Recognizing the rooftops' importance to the stadium, in 1937, then owner and chewing gum giant P.K. Wrigley instructed builders to design bleacher expansion so it would not interfere with the views between the rooftops and the inside of the ballpark.[195] He recognized then that the value of Wrigley Field's atmosphere included the allure of fans sneaking a bird's eye view from across Waveland and Sheffield Avenues. The importance of that ingredient to Wrigley Field, baseball, and ultimately our American heritage, has only grown in magnitude in this era of the new ballpark.

Clearly, Wrigley Field is a historic place deserving the public's protection. The City of Chicago has taken the initial steps to preserve the structure for future generations.[196] Yet, as has been explained, a structure's attachment to the community and its surroundings is an important part of the value society places on its built environment. As Professor Nivala described, although "a building has physical boundaries, its meaning and value depend on its relationship to the city outside."[197] The rooftop views were an important element of the Wrigley experience almost a century ago, and remain so today. Thus, they merit protection, if need be, through the sanction of the courts.

A century ago, a child could often sneak into a ballpark, climb a tree, or peer from across a building to catch a cheap glimpse of a game that belonged to them as much as to the adults paid to play it. Today, the north side of Chicago remains the only place to experience such a historic view. Of course, those sitting atop the Wrigleyville rooftops are no longer children with empty pockets, but the seats are now occupied by prosperous businesses charging top dollar for the "cheap seats."[198] While that abuse is no reason to permit the destruction of such historic views, it does raise an issue that has plagued many preservation situations. Through "maintenance costs and foregone income potential . . . [t]he cost of landmark preservation is being borne by landmark owners, not by society as a whole."[199]

One equitable device, advocated by many commentators, allows courts to offset "economic hardships incurred by private landowners as a result of resource protection programs" through the transfer of development rights.[200] This doctrine

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193. Elejalde-Ruiz, *supra* note 7, at A14.

194. Sean McAdam, *When to Leave Sacred Ground*, ESPN.com, *at* http://sports.espn.go.com/mlb/columns/story?id=1719986 (Jan. 27, 2004).

195. Elejalde-Ruiz, *supra* note 7, at A14.

196. *See supra* notes 13-15 and accompanying text.

197. Nivala, *supra* note 1, at 54; *see supra* note 154 and accompanying text.

198. *See* discussion *supra* Part I. Note that the fact that thousands of people a year line up to pay extreme prices for the rooftop views further augments the notion of their significance.

199. Gary L. Tygesson, *Allocating the Cost of Historic Preservation: Compensation for the Isolated Landmark Owner*, 74 NW. U. L. REV. 646, 648 (1979) (footnote omitted).

200. John J. Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021, 1062 (1975).

permits the transfer of development potential "from the host parcel to other parcels whose total development rights are thereby proportionally augmented."[201] The parties in the principal lawsuit to some extent utilized this doctrine in their settlement terms. Yet landowners may not always come to such agreements. The aforementioned agreement only guarantees the views for eight years, and still permits the Cubs organization to obstruct the views during that period at a cost.[202] Thus, courts may be needed to preserve such views, and the transfer of development rights doctrine is another tool available to remedy inequities that may impede a court's recognition of the social value and need.[203]

IV. THE CLOSER: CONCLUSION

In 1988, Wrigley Field became the final Major League Baseball venue with artificial lights. The same setting now provides an appropriate forum to reassess the doctrine of ancient lights. While American courts have generally refused to recognize property rights in light, air, and views, that rejection has been nothing more than a cost-benefit analysis weighing the underlying social policies of the era. Identical considerations also buttressed the English common law development of the ancient lights doctrine and the sister property interests in air and views. The changes in this arena of the law were merely reflections of the changes in the public's current and significant needs. The basis for the American rejection of such rights, essentially the potential of unbridled growth, has now been called into question and undermined by more contemporary and pressing public interests. As public policy has in fact always been the root of rejecting or accepting property rights to light, air, and views, courts should not allow important public interests in these particular rights to be stifled by archaic concerns.

Where society places value in a view, an opening of light, or a fresh current of air, which outweighs the interest of a landowner attempting to block the view, courts should equitably adapt the scope of nuisance law. Such a strong public policy exists in the form of historic preservation. Recognized and protected as a national policy by courts and legislatures alike, preservation law has shifted its focus to the protection of more than merely significant historical structures, but also to the community and surroundings that provide a structure with a sense of place and supply society with a historical feeling of identification. The rooftop views are precisely the sort of extension the new public attitude seeks to protect. They are an identifying mark of a dying element of a national pastime. Those views represent baseball's past, and their obstruction would prove a greater loss

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201. *Id.*

202. *See supra* notes 10-15 and accompanying text.

203. For a thorough discussion of transfer of development rights, see John J. Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972); John J. Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973); Note, *The Unconstitutionality of Transferable Development Rights*, 84 YALE L.J. 1101 (1975).

to society than the rival revenue gains. With such an important interest at stake, courts should not hesitate to create an actionable right to an unobstructed view of Wrigley Field. In doing so, they will be in accord with *Aldred*, *Fontainebleau*, and *Prah*, in rectifying property rights in light, air, and views, with the weight of social interests.